Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC. ET AL.,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 6, 2008

QUESTIONS PRESENTED

1. Whether the Second Circuit's ruling that Cablevision is not legally responsible for its copying and performance of Petitioners' copyrighted works fundamentally destabilizes copyright law and inverts the proper relationship between direct and secondary copyright infringement, due to the court's expansive misreading of *Sony Corp. v. Universal Studios* and complete disregard of *New York Times v. Tasini*.

2. Whether the Second Circuit erred in ruling that Cablevision is not directly liable for its copying of Petitioners' programs because (1) Cablevision designed and operates its service to use computers, rather than human beings, to make copies for customers who request them, and (2) "buffer" copies that Cablevision itself admittedly creates in that process are not "fixed," under a misreading of the plain language of the Copyright Act that conflicts with the interpretation uniformly adopted by three other Circuits and the Copyright Office.

3. Whether the Second Circuit erred by holding – under an interpretation of the Copyright Act that conflicts with the plain statutory language and decisions of other Circuits – that Cablevision's performances of Petitioners' programs are not "public," and therefore not infringing, because Respondent designed its service to send separate on-demand transmissions generated from separate copies of the same program to members of the public.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioners here and appellees below are The Cartoon Network, Inc. (formerly known as The Cartoon Network LP, LLLP); Cable News Network, Inc. (an entity formed following the merger of Cable News Network LP, LLLP into CNN Investment Company, Inc.); Turner Broadcasting System, Inc.; Turner Network Sales, Inc.; Turner Classic Movies, Inc.; Turner Network Television, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios Productions LLLP; Paramount Pictures Corporation; Disney Enterprises Inc.; CBS Broadcasting Inc.; American Broadcasting Companies, Inc.; and NBC Studios, Inc.,

Respondents here and appellants below are CSC Holdings, Inc. and Cablevision Systems Corp.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

Petitioner Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment Group, Inc. The parent of Fox Entertainment Group, Inc. is News Corporation, a publicly traded U.S. corporation. No publicly held company owns 10% or more of News Corporation's stock.

Petitioner Universal City Studios Productions LLLP is wholly and indirectly owned by NBC Universal, Inc. NBC Universal, Inc. is indirectly owned by General Electric Company, a publicly traded U.S. corporation, and Vivendi, S.A., a publicly traded French company. No publicly held company owns 10% or more of General Electric Company's or Vivendi S.A.'s stock.

Petitioner Paramount Pictures Corporation is wholly and indirectly owned by Viacom Inc., a publicly traded U.S. corporation. No publicly held company owns 10% or more of Viacom Inc.'s stock.

Petitioner Disney Enterprises, Inc. is a subsidiary of The Walt Disney Company, a publicly traded U.S. corporation. No publicly held company owns 10% or more of The Walt Disney Company's stock.

Petitioner CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a

publicly traded U.S. corporation. No publicly held company owns 10% or more of CBS Corporation's stock.

Petitioner American Broadcasting Companies, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded U.S. corporation. No publicly held company owns 10% or more of The Walt Disney Company's stock.

Petitioner NBC Studios, Inc. is wholly and indirectly owned by NBC Universal, Inc. NBC Universal, Inc. is indirectly owned by General Electric Company, a publicly traded U.S. corporation, and Vivendi, S.A., a publicly held French Company. No publicly held company owns 10% or more of General Electric Company's or Vivendi S.A.'s stock.

Petitioner The Cartoon Network, Inc. (formerly known as The Cartoon Network LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. The Cartoon Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Cable News Network, Inc. (an entity that was formed following the merger of Cable News Network LP, LLLP into CNN Investment Company, Inc.) is owned entirely by Turner Broadcasting

System, Inc. Cable News Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Broadcasting System, Inc. is jointly owned by Historic TW Inc., American Television and Communications Corporation, Warner Communications Inc., United Cable Turner Investment, Inc. and Time Warner Companies, Inc. Turner Broadcasting System, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Network Sales, Inc. is owned entirely by Turner Broadcasting System, Inc. Turner Network Sales, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Classic Movies, Inc. (formerly known as Turner Classic Movies LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. Turner Classic Movies, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Network Television, Inc. (formerly known as Turner Network Television LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. Turner Network Television, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

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OPINIONS BELOW

The court of appeals' opinion is reported at 536 F.3d 121 and reprinted at Pet. App. 1a-42a. The district court's opinion is reported at 478 F. Supp. 2d 607 and reprinted at Pet. App. 43a-80a.

JURISDICTION

The court of appeals entered judgment on August 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101 *et seq.*, reproduced at Pet. App. 81a-103a.

STATEMENT

A. Introduction

This case presents critical questions about the application of copyright law to automated computerized services that are rapidly reshaping how copyrighted works are reproduced, delivered, and consumed. Respondent Cablevision – a cable television operator – is launching a new service that automatically copies Petitioners' copyrighted television programming and then transmits those programs to subscribers on request, without authorization from copyright owners. Cablevision copies, stores, and transmits the programs at its own central facility, on a system that it designed and operates and that is under its exclusive physical possession and control, using copyrighted works it

selects and supplies for this purpose. In essence, Cablevision is taking programs it has licensed for its cable television service and misappropriating that content for an additional *unlicensed* use.

The Second Circuit reached the remarkable conclusion that Cablevision itself is not doing anything that infringes the exclusive rights of copyright owners to reproduce and publicly perform their works. The court attempted to justify that conclusion by reference to *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), reasoning that a subscriber asking Cablevision to copy and transmit programming is not "sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision] for copies that are made automatically upon that customer's command." Pet. App. 21a. Therefore, Cablevision could at most be liable as a secondary infringer under the standards of *Sony*.

That ruling fundamentally distorts copyright law by inverting the proper relationship between direct and secondary infringement. The Second Circuit expansively misread *Sony* – which did not even address the line between direct and secondary infringement, much less exempt automated services from direct liability – while ignoring this Court's ruling in *New York Times Co. v. Tasini*, 533 U.S. 483, 504 (2001), which considered and rejected the same argument the Second Circuit accepted here. Further, in order to implement its misguided immunity for Cablevision, the Second Circuit cast aside long-settled understandings of the

reproduction and public performance rights that are set forth in the plain language of the Copyright Act and decisions of other Circuits. As shown below, each of the conflicts and errors running through the Second Circuit's decision merits review in its own right. When they are all combined, the case for certiorari is especially compelling.

Practical considerations reinforce the pressing need for review. The Second Circuit has placed its influential imprimatur on what amounts to a blueprint for clever intermediaries to design and operate automated computer systems so as to evade the need for copyright licenses. That ruling undercuts investments in established *licensed* services made in reliance on settled law. If unchecked, this new free-riding business model will quickly become entrenched and difficult to dislodge through retroactive judicial repudiation. As automated delivery becomes the norm, the incentive to invest in the production of creative works and innovative mechanisms for their delivery will be jeopardized. The need for intervention by this Court could hardly be stronger.

B. The Copyright Act of 1976

Section 106 of the Copyright Act gives copyright owners "the exclusive rights to do and to authorize" the exploitation of their works in several ways. 17 U.S.C. § 106. In defining these rights, Congress used broad terminology to cover both anticipated and

unanticipated developments in technology, obviating the constant need for new legislation.[1]

Two exclusive rights are at issue here. The first is the right "to reproduce the copyrighted work in copies." *Id.* § 106(1). "Copies" are defined broadly as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* § 101. The standard for whether a work is "fixed" is similarly broad and functional to encompass new technology: the work's "embodiment in a copy" must be "sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

The second exclusive right is the right "to perform the copyrighted work publicly." *Id.* § 106(4). Again using broad language, Congress made clear that this right includes separate transmissions of performances to individual members of the public when and where they want it:

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[1] "A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. For these reasons, we believe that the author's rights should be stated in the statute in broad terms . . . ." *Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law:* 1965 Revision Bill, Copyright Law Revision Part 6 at 13-14, 89th Cong., 1st Sess. (Comm. Print 1965).

> To perform . . . a work "publicly" means: . . .
>
> (2) to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

That expansive definition also encompasses retransmission of television broadcasts by cable companies. *See, e.g., WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624-25 (7th Cir. 1982) (describing how 1976 Act changed this aspect of law). At the same time, Congress gave cable companies a statutory license for certain "secondary transmissions" of broadcast television – but only when a secondary transmission takes place at the same time and in the same form as the broadcast. 17 U.S.C. § 111(c) & (f).[2]

Accordingly, a cable company must negotiate an additional license to make copies of a broadcast program or to delay or alter its transmission. Furthermore, because the § 111 statutory license covers only broadcast programming, a cable company must negotiate a license for *any* transmission or

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[2] Congress delegated to the Register of Copyrights the authority to administer § 111. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988).

copying of programming from non-broadcast channels (*e.g.*, ESPN or CNN).

C. Automated Delivery of Copyrighted Works

This case concerns the Copyright Act's application to new computerized commercial services that are transforming how businesses provide access to, and how the public receives, copyrighted works. Petitioners, and their licensed business partners, are aggressively moving to make their creative works available to the public via computerized systems that automatically respond to customer requests to copy, watch, or download a particular program when and where the consumer wants it.

Automated services have existed for some time, but their rate of growth is now accelerating exponentially. As early as 2005, the number of "intensive on-demand media consumers" (those who use networked on-demand services in multiple ways) doubled from 11% to 21% of the public. Joel Russell, *The Age of Media On-Demand Looks Like It's Close at Hand*, L.A. Bus. J., May 29, 2006, at 16. That same year, 23% of the U.S. audience used video on-demand ("VOD"), and 10% watched television programming via streaming video on the Internet. *Id.* This market sector has continued to experience exponential growth since then. *See* Brooks Barnes, *ABC, Cox Bar Ad Skipping in Video on Demand*, Wall St. J., May 8, 2007, at B1. Similarly, Apple's

well-known iTunes service is selling more than 50,000 movies a day.[3]

Unfortunately, this development also provides fertile ground for "intermediaries" who have access to copyrighted works for one purpose (such as an initial broadcast into the home), but take advantage of the possibilities of modern digital technology to profit from that content in other, unauthorized ways, such as streaming on-demand performances or distributing permanent copies. By exploiting creative works without a license, these commercial operations are able to appropriate the value of the works that would otherwise accrue to the copyright owner.

D. Cablevision's Service

Cablevision offers a traditional cable service that allows its subscribers to view broadcast and non-broadcast programming. Pet. App. 4a. Its § 111 statutory license for broadcast stations and its negotiated licenses for non-broadcast programming authorize Cablevision to transmit these programs on a real-time basis directly to subscribers, in an uninterrupted and unaltered stream from Cablevision's central facility (called a "head-end") to each subscriber's home.

In addition, Cablevision offers a VOD service that allows customers to watch certain programs on demand at times of their choosing. *Id.* at 49a.

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[3] *Apple's iTunes Hits 5 Billion Mark*, CNETNews.com, June 19, 2008, available at http://news.cnet.com/8301-10784_3-9972528-7.html.

Cablevision has negotiated additional licenses from copyright owners to include programs in this service. *Id.*

Cablevision also offers subscribers set-top digital video recorder ("DVR") devices. *Id.* at 50a. The original DVR was a stand-alone copying device. Set-top DVRs reside in subscribers' homes, where all copying and playback occurs. Cablevision never possesses copies made on a set-top DVR, and does not transmit anything to a subscriber's home when a recorded program is replayed. *Id.*

More recently, Cablevision began developing the service at issue here. Cablevision's internal engineering specifications described it as a "VOD network" using "VOD architecture." 2d Cir. Joint Appendix C.A. 57-58, 352-53, 556-57, 626-27. In 2004, Cablevision indicated that all content offered by the service would be licensed from copyright owners. *Id.* at 61. By the time Cablevision announced the service, however, it had been relabeled as "Remote-Storage DVR" ("RS-DVR"), and Cablevision asserted it required no licenses.

Labels aside, Cablevision selects and supplies the range of copyrighted programs available on its "RS-DVR" service; makes copies of specific programs at Cablevision's central head-end facility at the request of subscribers; and then transmits performances of those shows from Cablevision's head-end to subscribers' homes when they want to view them. Pet. App. 53a, 56a, 58a. In the process, Cablevision makes a separate copy of a program for each subscriber who requests it. If 100,000 subscribers

request the entire season of the hit show *24*, Cablevision makes 100,000 identical copies of each episode of that series as it airs, and "assigns" one copy of each episode to each requesting subscriber. *Id.* at 58a. When a subscriber wants to view a particular episode, Cablevision transmits it to that subscriber using the particular copy Cablevision made and assigned. *Id.* at 59a-60a. No technological purpose is served by Cablevision's decision to make all these redundant copies. They exist only to support Cablevision's legal theory, which is (paradoxically) that Cablevision is exempt from copyright liability precisely because it makes *so many* copies – one for each requesting subscriber.

The decisions below describe the operation of the "RS-DVR" service in detail. *Id.* at 4a-6a, 51a-60a. Briefly, to provide its "RS-DVR" service, Cablevision heavily manipulates the stream of digital data for programming before it leaves Cablevision's head-end. Cablevision first splits the data stream in two. One stream flows to subscribers in real time pursuant to Cablevision's licenses for traditional cable service, providing scheduled programming without delay or alteration of the signal supplied by the programmers. *Id.* at 4a-5a.

The second, unlicensed stream is used for the "RS-DVR" service. *Id.* at 5a. That stream initially flows to a device at Cablevision's facility called a Broadband Multimedia-Service Router ("BMR"), where the data are copied and "buffered" — held in temporary random access memory ("RAM") — in 1.2-second increments. *Id.* This buffering allows the

BMR to reformat the digital program files in a way that permits their reproduction in permanent copies at later stages. *Id.*

The reformatted data go next to the so-called "Arroyo server," where they are copied into a "primary ingest buffer." *Id.* at 55a-56a. This buffer copies and stores three frames of video at a time for up to one-tenth of a second, which permits Cablevision to check whether customers have requested copies of a program and then make permanent copies if they have. *Id.*

The BMR and Arroyo buffer copies play no part in Cablevision's licensed transmission of programming. *Id.* at 53a-54a. They exist solely to permit reproduction of programs in permanent copies for later unlicensed transmission over the "RS-DVR" service. Cablevision takes all of the steps described above regardless of whether it has received a "copy" request from a subscriber. *Id.* at 56a.

Subscriber requests for copies enter the scene only *after* the programming data are buffered in the Arroyo Server. If one or more subscribers have requested a copy of a program, Cablevision's system instructs the server to use the buffer copy data to make a permanent copy of that program for each requesting subscriber, and then stores those copies at Cablevision's head-end. *Id.* at 56a-58a. When a subscriber later wants to watch a recorded program, Cablevision transmits that program from its head-end to the subscriber's home, exactly as it would in fulfilling a request for VOD programming. *Id.* at 59a.

The complex network of equipment and software necessary to carry out this copying and transmission for the "RS-DVR" service is housed in a secure facility at Cablevision's head-end and is not accessible to subscribers. *Id.* at 52a-53a, 66a-67a. Cablevision employees must staff the "RS-DVR" system around the clock to operate and maintain it. *Id.* at 52a-53a.

The "RS-DVR" service can be used only for programming Cablevision supplies, and only for the particular copyrighted works Cablevision chooses to make available. *Id.* at 53a. In planning the service, Cablevision considered making available only a few channels, but eventually decided to make available all programming included in a given customer's cable subscription. *Id.* Unlike a VCR or other neutral copying device, the "RS-DVR" service does not allow subscribers to copy and replay programs other than what Cablevision chooses to supply, or to use copies in any manner other than over Cablevision's service. *Id.* at 67a-68a, 71a.

E. Proceedings Below

1. Petitioners are copyright owners of many of the most popular movies, series, and other programming available on television. They license that programming to Cablevision for its regular cable service (and, for some programs, its VOD service). *Id.* at 3a. When Cablevision announced in March 2006 its intent to offer "RS-DVR" service without obtaining licenses, Petitioners sued to block that unlicensed exploitation of their works. *Id.* at 60a. Because their complaint concerned Cablevision's own

infringing conduct, not the actions of Cablevision's subscribers, Petitioners asserted only direct infringement claims. Cablevision denied direct infringement, but stipulated it would not assert a fair use defense to a direct infringement claim. *Id.* at 61a.

2. The district court granted Petitioners' motion for summary judgment and enjoined Cablevision from using the "RS-DVR" service to reproduce or publicly perform Petitioners' copyrighted works without licenses. *Id.* at 80a. The court rejected Cablevision's primary argument that it is shielded from direct liability because its subscribers – not Cablevision itself – "do" the copying and performances by making requests to which Cablevision "automatically" responds. *Id.* at 70a-71a; *see also id.* at 76a. Examining all that Cablevision does to design and operate the service, maintain exclusive physical control of and access to the equipment, and select and supply the content available, the court ruled that the copying and public performances are "done . . . by Cablevision, albeit at the customer's request." *Id.* at 72a.

That conclusion was bolstered by the district court's holding that the buffer copying Cablevision performs prior to any customer request infringes the right to make "fixed" copies. Following the interpretation of "fixed" adopted by three Circuits and the Copyright Office, the court concluded that embodiments in the buffers are fixed because they permit reproduction of works into complete, permanent copies. *Id.* at 73a-74a.

Finally, the district court held that Cablevision performs Petitioners' works "publicly." Under the statutory language and established precedent, "a transmission 'to the public' is a public performance, even if members of the public receive the transmission at separate places at different times. Such is the case here." *Id.* at 77a.

3. The Second Circuit reversed, based on its understanding of the relationship between direct and secondary liability under this Court's *Sony* decision. The court noted that its "refusal to find Cablevision directly liable" was "buttressed by the existence and contours of the Supreme Court's doctrine of contributory liability in the copyright context." *Id.* at 24a. The court did "not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision] for copies that are made automatically upon that customer's command." *Id.* at 21a.

Proceeding from that premise, the Second Circuit held that Cablevision is not directly liable for making unauthorized copies of Petitioners' works. Purporting to apply a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), the court focused on "the volitional conduct that causes the [specific] copy to be made." Pet. App. 20a. The Second Circuit concluded that the only "volitional conduct" that matters is a human being's decision to make a specific copy of a specific work. Therefore, the court found, "Cablevision's conduct in designing, housing, and

maintaining a system that exists only to produce a copy" is insufficiently "volitional" for direct liability. *Id.*

Next, the court held that the buffer copies Cablevision admittedly makes are not "fixed" and therefore do not infringe Petitioners' reproduction right. *Id.* at 18a. To reach that conclusion, the court rejected the interpretation of the statute adopted by three other Circuits and the Copyright Office, adding an ill-defined "durational requirement" on top of the functional standard employed by prior decisions. *Id.* at 11a-13a, 15a-16a.

Turning to public performance, the Second Circuit reserved the question whether Cablevision "does" the performances for purposes of direct liability. *Id.* at 28a. The court held instead that the performances Cablevision transmits to its subscribers are not "public" – thereby eliminating the possibility of both direct *and* indirect liability. *Id.* The court adopted a novel test that requires different members of the public to receive the "same" transmission for a performance to be public. *E.g.*, *id.* at 30a-31a. The court did not explain how that reading could be reconciled with the statute's express coverage of transmissions "at different times." 17 U.S.C. § 101. It sought to distinguish on their facts contrary cases finding public performance when members of the public received separate transmissions, because the transmissions in those cases were generated from one copy, instead of the separate copies created and used by the "RS-DVR" service. Pet. App. 37a-40a.

4. After the mandate issued, Cablevision announced the launch of the "RS-DVR" service "early next year." Richard Bellamy, *Cablevision to Launch Network DVR*, Broadcasting & Cable, Sept. 12, 2008, *available at* http://www.broadcastingcable.com/article/CA6595928.html.

REASONS FOR GRANTING THE WRIT

There is a pressing need for review of the decision below. Although Petitioners challenge Cablevision's own conduct, the Second Circuit shifted the focus to the conduct of Cablevision's customers and treated this case as though *Sony* supplied the controlling rule. But *Sony* is inapposite. Cablevision operates a centralized service that supplies, copies, and transmits Petitioners' programs on request. That conduct is completely unlike Sony's one-time sale of an in-home copying device as an article of commerce. Indeed, in *Tasini* this Court rejected the notion that *Sony* provides a shield from direct liability for services that automatically respond to user requests for copyrighted works. 533 U.S. at 504. By ignoring *Tasini* and viewing this case through the lens of *Sony*, the Second Circuit inverted the longstanding relationship between direct and secondary copyright infringement and permitted Cablevision to piggyback on any defenses (such as fair use) its customers might have, contrary to well-settled law. As it has repeatedly done before, this Court should intervene now to correct that misreading of the Court's own precedent. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (correcting misreading of *Sony*'s fair-use holding); *Metro-Goldwyn-Mayer Studios Inc.*

v. Grokster, Inc., 545 U.S. 913 (2005) (correcting misreading of *Sony*'s "substantial noninfringing use" defense).

To make this case fit the *Sony* mold, the Second Circuit was forced to distort key elements of copyright law. The court adopted and expanded the so-called "*Netcom*" rule, interpreting it as a categorical exemption from direct liability for copying by computerized services that automatically carry out user requests. Such a rule allows commercial services to engineer around direct liability by replacing human employees with computers. Under the rule as applied below, all of Cablevision's conduct in designing, housing, and operating its service, and selecting and supplying the copyrighted works available through it, is simply irrelevant to whether it is a direct infringer that "does" the copying. This sweeping ruling raises one of the most important issues in copyright law today. Computerized systems that automatically respond to consumer requests are becoming the dominant mode for delivering copyrighted works to the public, yet the Second Circuit has insulated them from direct liability. Particularly in light of the conflict with *Tasini*, this Court's guidance is needed on this critical issue.

The Second Circuit also had to reject the standard uniformly adopted by other Circuits and the Copyright Office for whether buffer copies are "fixed." Cablevision's buffer copies (which it indisputably makes without user input) meet the functional standard for fixation that prior authorities

have derived from the statutory language. But the Second Circuit imposed an additional, nebulous "durational requirement" for fixation, and held that Cablevision's buffers are noninfringing under that novel requirement. That ruling creating a circuit split was outcome determinative, and merits review in its own right.

The Second Circuit's ruling that Cablevision's performances are not "public" (and are therefore exempt from both direct *and* secondary liability) also calls out for review. The court's reasoning that a multitude of *separate* transmissions of the same program are by definition not public would eviscerate the public performance right by rendering all on-demand performances non-public. It flies in the face of the statutory language, which expressly encompasses performing a work by transmitting it "at different times." 17 U.S.C. § 101. Nor can that reasoning be squared with decisions from other Circuits adhering to the plain statutory language and holding that public performances may occur through separate transmissions. The Second Circuit cannot distinguish away this circuit conflict on the ground that Cablevision uses separate *copies* for its transmissions, because that *ad hoc* distinction has no basis in the statute. This Court – which has never addressed the scope of the public performance right under the 1976 Act – should resolve the conflict and restore the plain meaning of the law.

These glaring errors cannot be left in place while these fundamental issues "percolate." The stakes are simply too high, and the potential harms too severe.

The multiple errors below will begin right now to affect the development of industries delivering content to users, resulting in a host of new automated services that will become entrenched and extremely hard to dislodge if this Court disagrees with the Second Circuit years hence. These unlicensed services will undermine past and future investments in licensed services and severely erode the value of copyrights in the new era when creative works are delivered to consumers automatically and on demand. That, in turn, will undermine copyright's core function of providing an "engine of free expression" by "suppl[ying] the economic incentive to create and disseminate ideas." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quotation marks omitted).

I. This Case Presents Critically Important Questions About the Application of Copyright Law to Automated Delivery of Copyrighted Content.

The Second Circuit's decision undermines the very foundations of copyright law as it applies to computerized services that are reshaping how the public receives and consumes copyrighted works. As shown *infra*, each of the Second Circuit's individual holdings absolving Cablevision of responsibility for unauthorized copying and public performance rests on a serious misreading of copyright law that conflicts with other authorities and independently merits review. But the core problem goes much deeper. Misreading *Sony*, and ignoring *Tasini*, the

Second Circuit distorted the entire framework of copyright law.

1. Through its "RS-DVR" service, Cablevision takes copyrighted programs it has licensed for real-time transmissions and exploits them in an additional *unlicensed* way for profit. Such unauthorized commercial exploitation lies at the very heartland of direct copyright infringement. But the Second Circuit assessed Cablevision's responsibility based not on its own conduct, but on that of its customers, and therefore treated this case as just like *Sony*. *E.g.*, Pet. App. 21a (court did "not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision]").[4] Mapping this case onto *Sony*, the court ruled that copies of Petitioners' programs are made solely by

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[4] In so ruling, the Second Circuit assumed that either the subscriber or Cablevision could be a direct infringer, but not both. That conflicts with prior cases. *E.g.*, *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988) (holding that retailers as well as customers are directly liable for making copies on retailers' premises); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 643-45 (7th Cir. 2001) (holding that newspaper and advertiser could both be directly liable for infringing advertisement); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975) ("An orchestra ... [that] performs a copyrighted musical composition ... without a license is thus clearly an infringer .... The entrepreneur who sponsors such a public performance ... is also an infringer – direct or contributory.").

Cablevision's subscribers, who then view them in purely private performances.

But the conduct of Cablevision itself is completely unlike that of the manufacturer and seller of a VCR. In *Sony*, it was undisputed that the defendant was not a direct infringer, because its only link to infringing conduct "occurred at the moment of sale" of a product. 464 U.S. at 438; *see also id.* at 440 (claim "predicated entirely on the sale of an article of commerce"). Hence, *Sony* did not address where the line between direct and secondary infringement lies – much less suggest that a company like Cablevision, which selects, supplies, copies, and performs copyrighted works, is immune from direct liability for copying and from all liability for public performance.[5]

The Second Circuit's approach conflicts with well-settled law. As the en banc Sixth Circuit explained, when a commercial defendant is charged with direct infringement, it is *irrelevant* whether "it would be fair use for [its customers] to make their own copies," because "[t]he courts have . . . properly rejected

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[5] It is no accident that the conduct of the customers is similar in both cases because, like the time-shifting at issue in *Sony*, commercial on-demand delivery of copyrighted content allows consumers to view programs when they want them. The critical difference lies in what the commercial supplier does. Congress intended the exclusive rights of copyright owners to cover commercial on-demand services, and *Sony*'s holding that certain in-home time-shifting is fair use did not override that congressional intent.

attempts by for-profit users to stand in the shoes of their customers." *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc) (quotation marks omitted).

The Second Circuit, however, has let Cablevision "stand in the shoes of [its] customers." Because secondary liability is purely derivative and thus requires proof of direct infringement by customers, *Sony*, 464 U.S. at 434, any customer fair use defense would also be a defense to a secondary liability claim against Cablevision. Hence, by holding that Cablevision could be liable only as a secondary infringer (if at all), the decision below allows Cablevision to piggyback on any fair use defense its subscribers might have, contrary to the settled law reaffirmed in *Princeton*. In addition, secondary liability requires proof of elements like knowledge, intent, and financial interest, *Grokster*, 545 U.S. at 930, which are irrelevant to direct infringement as a strict-liability tort. Thus, the Second Circuit was wrong in saying that "contributory liability stands ready to provide adequate protection to copyrighted works" where – as here – courts "construe the boundaries of direct liability [too] narrowly." Pet. App. 24a.

2. The Second Circuit's misreading of *Sony* also conflicts with this Court's decision in *Tasini*. That case involved a computerized database that made and distributed copies of newspaper articles when users of the service requested them. Exactly as here, the database operators "invoke[d] *Sony*" and argued that they "could be liable only under a theory of

contributory infringement, based on end-user conduct, which the [plaintiffs] did not plead." *Tasini*, 533 U.S. at 504. Flatly rejecting that attempt to foist responsibility onto consumers, the Court held the database operator directly liable for its copying and distribution via an automated system. *Id.*

Inexplicably, the Second Circuit ignored *Tasini* altogether. Indeed, its ruling could have been lifted from the *dissent* in that case. *Compare* Pet. App. 26a-27a ("copies produced by the RS-DVR system are 'made' by the RS-DVR customer, and Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability"), *with* 533 U.S. at 518 & n.14 (Stevens, J., dissenting) (reasoning that under *Sony* "it would be more accurate to say that [the database service] makes it possible for users to make and distribute copies").

3. Review of the Second Circuit's decision is needed now because of the profound real-world consequences it threatens. The implications of the Second Circuit's attempt to turn the indirect-liability exception into the rule by shifting the focus of copyright law onto consumers, while treating commercial intermediaries as presumptively immune from direct liability, go far beyond this case. Indeed, if that decision is not reviewed and corrected by this Court, it will fundamentally distort how the exploding market for automated services develops. *See* Brian Stelter, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. Times, Aug. 5, 2008, at C8 (analyst observing that Second Circuit's decision has

"seismic implications across the media landscape"). The result will be an "installed base" of unlicensed Cablevision-like services that will drive legitimate competitors who pay license fees out of the market and prove almost impossible to eradicate after the fact.

This case is thus on a par with *Sony*, *Tasini*, and *Grokster* in terms of its significance to the development of new markets and technologies. In each case, the lower court decision had the potential to determine whether copyright owners should be compensated for new uses of their works that advances in technology made possible. In each case, this Court intervened because the consequences were important enough that the Court should determine the national rule. The stakes here are equally high. Most of the nation's major video content providers are Petitioners. The case has been closely watched by content owners and service providers alike, and there was widespread *amicus* participation from interested parties on all sides in the Second Circuit – in recognition that this case will set a standard for copyright protection in the marketplace of automated access to and delivery of copyrighted works. This is manifestly a situation in which this Court should have the final say.

II. The Second Circuit's Reproduction Rulings Merit Review.

To implement its misguided notion that this case is just like *Sony*, the Second Circuit had to distort basic rules of copyright law to shield Cablevision from direct liability for infringing Petitioners'

exclusive reproduction rights. The court adopted a categorical exemption for operators of computerized services from direct liability when they automatically carry out user requests to make copies. And the court ruled that Cablevision's buffer copies are not "fixed" and thus not infringing, creating a conflict with the uniform interpretation of other Circuits and the Copyright Office. Both rulings merit review in their own right.

A. The Second Circuit's Categorical Exemption from Direct Liability for Automated Services Presents a Question of Singular Importance.

The Second Circuit's decision to exonerate Cablevision for the unauthorized copying of Petitioners' works raises an exceedingly important issue: whether operators of computerized services that automatically copy works when requested by users are ever directly liable for that infringement. The decision below adopted a sweeping categorical exemption from direct liability for such services. That exemption will eviscerate the exclusive right of authors to reproduce their creative works as human employees are increasingly replaced by computerized on-demand services.

The Copyright Act gives an author "the exclusive rights to do and to authorize" several things, including "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). A direct infringer is "[a]nyone who violates any of the exclusive rights of the copyright owner." *Id.* § 501(a). Under any common understanding of this statutory language, Cablevision directly infringes ("violates") the

exclusive right "to do and to authorize" the reproductions of Petitioners' works. Cablevision itself designed and operates the service, maintains exclusive physical control of and access to the equipment through which it operates, and selects and supplies the content that subscribers may request for on-demand recording and performances. As the district court recognized, the copying is "done . . . by Cablevision, albeit at the customer's request." Pet. App. 72a. Indeed, as explained above, in *Tasini* this Court flatly rejected the notion that computerized systems are immune from direct liability when they automatically copy works in response to user requests. *See supra* at 21-22.

The Second Circuit set aside all of "Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy" as irrelevant, because it believed the only conduct sufficient to trigger direct liability is "volitional conduct" by a "human employee" at the moment when a subscriber selects a particular program for permanent copying. Pet. App. 20a, 22a. That holding ignores the reality that human employees engage in "volitional conduct" in designing and operating this service under the direction of Cablevision's human management.

The court did not explain how its ruling could be squared with the statute's broad, non-technical phrase – "to do and to authorize" – or with *Tasini*. Instead, building on its misreading of *Sony*, the court invoked a line of cases addressing direct liability for incidental copying over the Internet, starting with

the district court decision in *Netcom*. Pet. App. 19a. *Netcom* addressed the potential liability of an Internet Service Provider ("ISP") whose servers temporarily hosted user-supplied copyrighted material in the course of providing basic Internet facilities. Against that backdrop, *Netcom* opined that "[a]lthough copyright is a strict liability statute, there should still be *some element of volition or causation*" for direct liability. 907 F. Supp. at 1370 (emphasis added). Thus, the *Netcom* decision excluded only purely involuntary or incidental involvement with copying from the scope of direct liability in a situation where a subscriber uploaded a file to his ISP that was then automatically transferred to another ISP. *Id.* at 1368-69 (concluding that "the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean Netcom has caused the copying").

In 1998, Congress enacted the Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512, to address the issue that had troubled the *Netcom* court by crafting carefully circumscribed safe-harbors from copyright liability for ISPs. Those safe-harbors extend only to ISPs – not non-Internet services like Cablevision's "RS-DVR" – and only cover four specific aspects of basic Internet functionality, none of which involve actively exploiting copyrighted content. *Id.* § 512(a)-(d). Even then, the ISP must meet additional requirements to qualify for the safe-harbors, such as terminating repeat infringers and appropriately responding to notices of infringing conduct. *Id.*

§ 512(a)-(d), (i)(1)(A). If automated services were immune from direct liability when they automatically respond to user requests, there would have been no need for Congress to create very narrow and highly qualified ISP safe-harbors under these circumstances.

Nonetheless, the so-called *Netcom* rule has acquired a life of its own in the lower courts, unmoored from any statutory grounding, and without the limitations of § 512. In *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), for example, the Fourth Circuit held that *Netcom* precludes direct liability for a website that copies and displays infringing photographs submitted by its customers. *CoStar* granted this immunity even though the website's employees reviewed each photograph before it was displayed on the site. *Id.* at 555-56.

Now the Second Circuit has expanded *Netcom* in another direction, to immunize a closed on-demand system in which customers must choose among specific copyrighted works supplied to them by Cablevision itself. In *Netcom*, the openness of the Internet and the fact that the ISP had no role in supplying the copyrighted content weighed heavily against direct liability. 907 F. Supp. at 1372-73. Here, in contrast, Cablevision has complete discretion in selecting which copyrighted programs subscribers may choose for copying. Cablevision maintains control over the copies and allows subscribers to access them only using Cablevision's service. Yet, despite acknowledging that

Cablevision's conduct "is indeed more proximate to the creation of illegal copying than, say, operating an ISP or opening a copy shop, where all content was supplied by the customers themselves or other third parties," Pet. App. 23a, the Second Circuit still held that the only conduct that counts is "volitional" conduct by a human being at one specific point in the process: when a customer selects from among the programs supplied by Cablevision. *Id.* at 22a.

As the Second Circuit's analysis exemplifies, lower courts are treating *Netcom* as if it were a decision of this Court (while ignoring *Tasini*) and then extrapolating a growing loophole in copyright law from it. *Netcom's* context-sensitive holding is thereby expanding into a blanket immunity for all businesses that employ computers instead of humans to carry out customer requests for unauthorized copies – without the careful limitations enacted by Congress in § 512. Without any guidance from this Court, the legal landscape is largely being defined by the spread of that judge-made rule at the very time when automated delivery of copyrighted works is skyrocketing, both on the Internet and on closed services like Cablevision's.

To be sure, not every court has followed suit. The Fifth Circuit refused to recognize a categorical *Netcom* rule to immunize an on-demand Internet service from direct liability in an unpublished decision. *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (unpublished table decision) (affirming on grounds stated in district court

opinion). The defendant service was held liable as a direct infringer in light of the totality of its conduct, including its discretion in selecting content available for copying. 991 F. Supp. at 552-53 ("Webbworld cannot now evade liability by claiming helplessness in the face of its 'automatic' operation."). The existence of this divergent authority highlights the need for review of this fundamentally important question.

B. The Second Circuit's Buffer-Copy Holding Creates a Conflict with Other Circuits and the Copyright Office.

To exempt Cablevision from direct liability, the Second Circuit also had to rule that the buffer copies Cablevision itself admittedly creates are not "fixed" and thus are noninfringing. Pet. App. 18a. That ruling conflicts with the standard employed by other Circuits and the Copyright Office.[6]

In deciding whether temporary buffer copies are "fixed," prior cases have uniformly adopted the standard derived from the statutory definition in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). There the defendant argued that

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[6] Of course, even if the buffer copies were not themselves "fixed" copies, they are indisputably the first steps in making permanent copies when requested by subscribers, and Cablevision carries out these steps with no user input. *Supra* at 9-10. But the Second Circuit ignored Cablevision's unilateral buffering conduct in holding that Cablevision does not directly infringe when it carries out subscriber requests for permanent copies.

buffer copies loaded into random access memory ("RAM") were not "fixed" because they were temporary. Rejecting that argument, the Ninth Circuit held that all that is required to satisfy the statutory definition of "fixed" is that the embodiment be "*sufficiently* permanent or stable to *permit* [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (emphasis added); *see MAI*, 991 F.2d at 519 ("since we find that the copy created in the RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act").

Under *MAI*'s definition, a work is "fixed" so long as its embodiment endures long enough (or in the statutory language, is "sufficiently permanent or stable") to permit the work's perception, reproduction, or communication. *MAI*, 991 F.2d at 517-18; *see also* Jane C. Ginsburg, *Putting Cars on the "Information Superhighway,"* 95 Colum. L. Rev. 1466, 1476 n.39 (1995). Two other circuits have adopted *MAI*'s reading. *See Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998); *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1311 (Fed. Cir. 2005).

The Copyright Office also adopted the *MAI* reading in a congressionally mandated report issued after notice and comment. U.S. Copyright Office, *DMCA Section 104 Report* (Aug. 2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-

104-report-vol-1.pdf. Like the Ninth Circuit, the Copyright Office drew a "dividing line . . . between reproductions that exist for a sufficient period of time to be capable of being 'perceived, reproduced, or otherwise communicated,' and those that do not." *Id.* at 111. It also rejected the notion of an independent requirement that the embodiment exist for some arbitrary additional period of time. *Id.* at 113.

The Second Circuit, however, added an extra requirement beyond what *MAI* requires. First, "the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium." Pet. App. 11a. That is the very same requirement adopted by *MAI* – and Cablevision's buffer copies indisputably meet *this* requirement. *Id.* at 16a. Thus, if the Second Circuit had adopted the *MAI* standard, it would necessarily have concluded that Cablevision's buffers are "fixed."

But the Second Circuit grafted on a second requirement: the work "must remain thus embodied 'for a period of more than transitory duration.'" *Id.* at 11a. And the court held that Cablevision's buffers fail that novel requirement, because "[n]o bit of data remains in [the] buffer for more than a fleeting 1.2 seconds." *Id.* at 17a. Of course, 1.2 seconds is not "fleeting" for a computer. With twenty-first century technology, buffering for 1.2 seconds is sufficient to permit reproduction of the works in permanent copies – the standard *MAI* derived from the statutory language.

Thus, the court's ruling that Cablevision's buffer copies are not "fixed" flows directly from its

departure from the test adopted by all prior authorities. The Second Circuit recognized as much when it acknowledged that it was rejecting the Copyright Office's reading, Pet. App. 16a (court "not persuaded" by interpretation) – which is identical to the reading adopted by *MAI* and two other Circuit courts.

Moreover, the Second Circuit's ruling rests on an obvious misreading of the statute, which defines a copy as "fixed" "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. The court assumed the phrase "for a period of more than transitory duration" modifies the word "embodiment" – from which it is separated by several lines of text – instead of the immediate series of antecedents "perceived, reproduced, or otherwise communicated." That strained reading conflicts with ordinary usage and canons of statutory construction. Modifiers almost always modify the words immediately adjacent to them. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 & n.4 (2005). It would have been easy for Congress to draft a statute stating that the "embodiment" must exist "for a period of more than transitory duration," but it did not do so. The Second Circuit's outcome-determinative adoption of that reading in conflict with other Circuits plainly merits review.

III. The Second Circuit's Holding That Cablevision Does Not "Publicly" Perform Petitioners' Works Conflicts with the Plain Statutory Language and Prior Circuit Decisions.

The Second Circuit also adopted an unsupportable interpretation of the public performance right to justify its conclusion that performances of Petitioners' works over Cablevision's "RS-DVR" service are (like time-shifting in *Sony*) purely private. That reading conflicts with the plain statutory language and decisions applying it. It also sets forth a blueprint for providers of on-demand services to design their systems to evade copyright liability, even as they profit from delivery of unauthorized performances to thousands or millions of subscribers.

1. The plain language of the Copyright Act leaves no doubt that separate on-demand transmissions of a performance to thousands of subscribers at different times constitute a "public" performance. To perform a work "publicly" means, *inter alia*, "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times." 17 U.S.C. § 101 ("transmit clause"). That definition plainly encompasses a performance completed via separate, non-simultaneous transmissions to individual customers who receive the performance on demand. Jane C. Ginsburg, *Can Copyright Become User-Friendly?*, 25 Colum. J.L. & Arts 71, 83 (2001) ("an

on demand audio- or videostream of a work falls squarely within the definition of a 'public performance or display'").[7]

Prior to the decision below, every court to consider on-demand performances via separate transmissions held that they infringe the public performance right. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984), for example, the Third Circuit held that a video rental store publicly performed videos when it transmitted the recorded works to private viewing booths upon request — even though only one or two people could view each separate transmission of a video. *Id.*; *see also, e.g., Columbia Pictures Indus., Inc. v. Prof. Real Estate Investors, Inc.*, 866 F.2d 278, 282 nn.6-7 (9th Cir. 1989) (public performance by hotel that separately transmits works to individual hotel rooms on request); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (same); *Video Pipeline, Inc. v. Buena Vista Home Enter., Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (Internet streaming of videos "to

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[7] That is confirmed by another section of the Copyright Act providing that "interactive services" that engage in the "performance of a sound recording publicly" must negotiate licenses to do so. 17 U.S.C. § 114(d)(3)(A). "Interactive services" are those that "enable[ ] *a member* of the public to receive . . . on request, a transmission of a particular sound recording." *Id.* § 114(j)(7) (emphasis added). Thus, the Act consistently treats on-demand transmissions to individual members of the public as public performances.

individual computers" "constitute[s] a public performance"), *aff'd*, 342 F.3d 191 (3d Cir. 2003).

The Second Circuit departed from the plain statutory language and all prior case law. It reasoned that a performance is not public if individuals receive it via separate transmissions. The court thought that "the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons 'capable of receiving' it, to determine whether that transmission is made 'to the public.'" Pet. App. 41a; *see also id.* at 34a ("when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission"). On this view, the fact that Cablevision transmits an identical performance to thousands of paying subscribers is irrelevant. Each particular point-to-point transmission must be examined separately in determining whether a performance is public. And because each "particular transmission," Pet. App. 30a, runs from Cablevision solely to one subscriber, its performances are, in the Second Circuit's view, private.

That reasoning is irreconcilable with *Redd Horne* and the other cases cited above, which hold that *performance* of a work is public even if it is received by each individual recipient via separate *transmissions*. Thus, the Second Circuit's "conclusion that, under the transmit clause, we must examine the potential audience of a given transmission . . . to determine whether that

transmission is 'to the public,'" Pet. App. 36a, creates a Circuit conflict.

To paper over that conflict, the Second Circuit tried to distinguish *Redd Horne* on its facts by narrowing its own holding to apply only where the separate transmissions of a work are generated from separate copies of the work. Pet. App. 37a-38a. But that logical *non sequitur* should not succeed in insulating the Second Circuit's decision from review, because it is completely unmoored from the statute Congress enacted. The Act's definition of public performance does not mention copies at all, much less the number of copies used to generate transmissions of a performance.[8] By piling the number of copies on top of the number of transmissions as defining criteria of a public performance, the Second Circuit's reading moved beyond any plausible construction of the statutory text. Indeed, Congress provided that a public performance may be accomplished "by means of any device or process." 17 U.S.C. § 101. Transmitting a work to the public by first making separate copies for each recipient and then generating transmissions from each copy is still transmission "by means of any . . . process."

2. The Second Circuit's tortured reading of the public performance right will have profoundly destabilizing effects on the emerging marketplace for

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[8] Indeed, a public performance can take place without the use of any copies – for example, when an opera is broadcast live over the radio.

services that perform works on demand. By focusing on the public or private nature of each "particular transmission," the Second Circuit threatens to place every on-demand service outside the scope of the public performance right. And even when the holding below is limited to services in which each transmission originates from a "distinct" copy, on-demand services will simply adopt the same "copy then play" two-step used by Cablevision. When a customer wants to view an on-demand program, she will simply send an electronic request first to "copy" and then to "play" the desired work. The service will make a unique copy of the work as an automatic response to the request, and transmit the program from that unique copy. Under the decision below, that requires no license, because the service provider is not directly liable for the automated copying, *see supra* Part II.A, and is not liable at all for the transmission made from the separate copy.

The scope of the Second Circuit's holding goes far beyond cable systems and includes the Internet or any other method of transmitting performances on demand. Any company with a digital copy of a work can readily avail itself of this gaping loophole. Copyright owners and others who have invested substantially in developing and licensing innovative automated offerings in reliance on settled law are at risk of having this investment undercut by the unlicensed services approved by the Second Circuit.

The decision will also distort technological innovation. Rather than requiring engineers to create more efficient ways to deliver content on

demand, companies will ask their lawyers to develop more creative ways to skirt the copyright laws. Multiple copies will be used by on-demand services, even when a single copy is more efficient, whenever the cost of the additional server space is less than the cost of negotiating and paying for a license. The result will be to undermine the incentive to invest in creative works and reward the use of inefficient technology.

The Second Circuit's only response is to note — apparently without intended irony — that copyright owners can enforce their exclusive reproduction right against services that make multiple copies to support their "copy then play" services. Pet. App. 37a. As discussed above, in the same opinion the court provided a roadmap for evading liability for making reproductions as well.

3. While the effect of the decision below goes far beyond cable television, review is appropriate here for the additional reason that the Second Circuit has blessed Cablevision's end run around the limitations of its § 111 license for secondary cable transmission of broadcast television. 17 U.S.C. § 111(c), (f). Congress included both the "transmit" clause of the public performance definition and the § 111 statutory license in the 1976 Act in response to this Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which had held that cable transmissions do not infringe the public performance right under pre-1976 legislation. *See*

WGN, 693 F.2d at 624 (recounting history). The 1976 Act clarified that the public performance right encompasses cable transmissions, and granted cable companies a statutory license for *simultaneous* retransmission of broadcast television. The self-evident purpose of this legislation was to require cable companies to negotiate licenses for all other transmission of copyrighted programming – and in particular, for delayed programming. But that is exactly what the Second Circuit has now said Cablevision may do without obtaining a license.

This Court has never revisited the scope of the public performance right since the 1976 Act overturned *Fortnightly* and *Teleprompter*. Now, 34 years after *Teleprompter*, in the face of another decision exempting a cable company from licensing obligations, there is an urgent need for the Court's guidance concerning this issue, particularly in light of the other compelling questions presented by this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Appendix A

United States Court of Appeals, Second Circuit.

The CARTOON NETWORK LP, LLLP and Cable News Network L.P., L.L.L.P., Plaintiffs-Counter-Claimants-Defendants-Appellees,
Twentieth Century Fox Film Corporation, Universal City Studios Productions LLLP, Paramount Pictures Corporation, Disney Enterprises Inc., CBS Broadcasting Inc., American Broadcasting Companies, Inc., NBC Studios, Inc., Plaintiffs-Counter-Defendants-Appellees,

v.

CSC HOLDINGS, INC. and Cablevision Systems Corporation, Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs-Appellants,

v.

Turner Broadcasting System, Inc., Cable News Network LP, LLP, Turner Network Sales, Inc., Turner Classic Movies, L.P., LLLP, Turner Network Television LP, LLLP, Third-Party-Defendants-Appellees.

Docket Nos. 07-1480-cv(L), 07-1511-cv(CON).

Argued: Oct. 24, 2007.
Decided: Aug. 4, 2008.

Before: WALKER, SACK, and LIVINGSTON, Circuit Judges.

JOHN M. WALKER, JR., Circuit Judge:

Defendant-Appellant Cablevision Systems Corporation ("Cablevision") wants to market a new "Remote Storage" Digital Video Recorder system ("RS-DVR"), using a technology akin to both traditional, set-top digital video recorders, like TiVo ("DVRs"), and the video-on-demand ("VOD") services provided by many cable companies. Plaintiffs-Appellees produce copyrighted movies and television programs that they provide to Cablevision pursuant to numerous licensing agreements. They contend that Cablevision, through the operation of its RS-DVR system as proposed, would directly infringe their copyrights both by making unauthorized reproductions, and by engaging in public performances, of their copyrighted works. The material facts are not in dispute. Because we conclude that Cablevision would not directly infringe plaintiffs' rights under the Copyright Act by offering its RS-DVR system to consumers, we reverse the district court's award of summary judgment to plaintiffs, and we vacate its injunction against Cablevision.

BACKGROUND

Today's television viewers increasingly use digital video recorders ("DVRs") instead of video cassette recorders ("VCRs") to record television programs and play them back later at their convenience. DVRs generally store recorded programming on an internal hard drive rather than a cassette. But, as this case demonstrates, the generic term "DVR" actually refers to a growing number of different devices and

systems. Companies like TiVo sell a stand-alone DVR device that is typically connected to a user's cable box and television much like a VCR. Many cable companies also lease to their subscribers "set-top storage DVRs," which combine many of the functions of a standard cable box and a stand-alone DVR in a single device.

In March 2006, Cablevision, an operator of cable television systems, announced the advent of its new "Remote Storage DVR System." As designed, the RS-DVR allows Cablevision customers who do not have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a "remote" location. RS-DVR customers may then receive playback of those programs through their home television sets, using only a remote control and a standard cable box equipped with the RS-DVR software. Cablevision notified its content providers, including plaintiffs, of its plans to offer RS-DVR, but it did not seek any license from them to operate or sell the RS-DVR.

Plaintiffs, which hold the copyrights to numerous movies and television programs, sued Cablevision for declaratory and injunctive relief. They alleged that Cablevision's proposed operation of the RS-DVR would directly infringe their exclusive rights to both reproduce and publicly perform their copyrighted works. Critically for our analysis here, plaintiffs alleged theories only of direct infringement, not contributory infringement, and defendants waived any defense based on fair use.

Ultimately, the United States District Court for the Southern District of New York (Denny Chin, *Judge*), awarded summary judgment to the plaintiffs and enjoined Cablevision from operating the RS-DVR system without licenses from its content providers. *See Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.* (*Cablevision I*), 478 F. Supp. 2d 607 (S.D.N.Y. 2007). At the outset, we think it helpful to an understanding of our decision to describe, in greater detail, both the RS-DVR and the district court's opinion.

I. Operation of the RS-DVR System

Cable companies like Cablevision aggregate television programming from a wide variety of "content providers"-the various broadcast and cable channels that produce or provide individual programs-and transmit those programs into the homes of their subscribers via coaxial cable. At the outset of the transmission process, Cablevision gathers the content of the various television channels into a single stream of data. Generally, this stream is processed and transmitted to Cablevision's customers in real time. Thus, if a Cartoon Network program is scheduled to air Monday night at 8pm, Cartoon Network transmits that program's data to Cablevision and other cable companies nationwide at that time, and the cable companies immediately re-transmit the data to customers who subscribe to that channel.

Under the new RS-DVR, this single stream of data is split into two streams. The first is routed immediately to customers as before. The second stream flows into a device called the Broadband Media Router ("BMR"), *id.* at 613, which buffers the data stream, reformats it, and sends it to the "Arroyo Server," which consists, in relevant part, of two data buffers and a number of high-capacity hard disks. The entire stream of data moves to the first buffer (the "primary ingest buffer"), at which point the server automatically inquires as to whether any customers want to record any of that programming. If a customer has requested a particular program, the data for that program move from the primary buffer into a secondary buffer, and then onto a portion of one of the hard disks allocated to that customer. As new data flow into the primary buffer, they overwrite a corresponding quantity of data already on the buffer. The primary ingest buffer holds no more than 0.1 seconds of each channel's programming at any moment. Thus, every tenth of a second, the data residing on this buffer are automatically erased and replaced. The data buffer in the BMR holds no more than 1.2 seconds of programming at any time. While buffering occurs at other points in the operation of the RS-DVR, only the BMR buffer and the primary ingest buffer are utilized absent any request from an individual subscriber.

As the district court observed, "the RS-DVR is not a single piece of equipment," but rather "a complex system requiring numerous computers, processes,

networks of cables, and facilities staffed by personnel twenty-four hours a day and seven days a week." *Id.* at 612. To the customer, however, the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR. Using a remote control, the customer can record programming by selecting a program in advance from an on-screen guide, or by pressing the record button while viewing a given program. A customer cannot, however, record the earlier portion of a program once it has begun. To begin playback, the customer selects the show from an on-screen list of previously recorded programs. *See id.* at 614-16. The principal difference in operation is that, instead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to the Arroyo Server at Cablevision's central facility. *See id.* In this respect, RS-DVR more closely resembles a VOD service, whereby a cable subscriber uses his remote and cable box to request transmission of content, such as a movie, stored on computers at the cable company's facility. *Id.* at 612. But unlike a VOD service, RS-DVR users can only play content that they previously requested to be recorded.

Cablevision has some control over the content available for recording: a customer can only record programs on the channels offered by Cablevision (assuming he subscribes to them). Cablevision can also modify the system to limit the number of channels available and considered doing so during development of the RS-DVR. *Id.* at 613.

II. The District Court's Decision

In the district court, plaintiffs successfully argued that Cablevision's proposed system would directly infringe their copyrights in three ways. First, by briefly storing data in the primary ingest buffer and other data buffers integral to the function of the RS-DVR, Cablevision would make copies of protected works and thereby directly infringe plaintiffs' exclusive right of reproduction under the Copyright Act. Second, by copying programs onto the Arroyo Server hard disks (the "playback copies"), Cablevision would again directly infringe the reproduction right. And third, by transmitting the data from the Arroyo Server hard disks to its RS-DVR customers in response to a "playback" request, Cablevision would directly infringe plaintiffs' exclusive right of public performance. *See id.* at 617. Agreeing with all three arguments, the district court awarded summary declaratory judgment to plaintiffs and enjoined Cablevision from operating the RS-DVR system without obtaining licenses from the plaintiff copyright holders.

As to the buffer data, the district court rejected defendants' arguments 1) that the data were not "fixed" and therefore were not "copies" as defined in the Copyright Act, and 2) that any buffer copying was de minimis because the buffers stored only small amounts of data for very short periods of time. In rejecting the latter argument, the district court noted that the "aggregate effect of the buffering" was to reproduce the entirety of Cablevision's programming,

and such copying "can hardly be called de minimis." *Id.* at 621.

On the issue of whether creation of the playback copies made Cablevision liable for direct infringement, the parties and the district court agreed that the dispositive question was "*who* makes the copies"? *Id.* at 617. Emphasizing Cablevision's "unfettered discretion" over the content available for recording, its ownership and maintenance of the RS-DVR components, and its "continuing relationship" with its RS-DVR customers, the district court concluded that "the copying of programming to the RS-DVR's Arroyo servers ... would be done not by the customer but by Cablevision, albeit at the customer's request." *Id.* at 618, 620, 621.

Finally, as to the public performance right, Cablevision conceded that, during the playback, "the streaming of recorded programming in response to a customer's request is a performance." *Id.* at 622. Cablevision contended, however, that the work was performed not by Cablevision, but by the customer, an argument the district court rejected "for the same reasons that [it] reject[ed] the argument that the customer is 'doing' the copying involved in the RS-DVR." *Id.* Cablevision also argued that such a playback transmission was not "to the public," and therefore not a public performance as defined in the Copyright Act, because it "emanates from a distinct copy of a program uniquely associated with one customer's set-top box and intended for that customer's exclusive viewing in his or her home." *Id.*

The district court disagreed, noting that "Cablevision would transmit *the same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback." *Id.* at 623 (emphasis added). The district court also relied on a case from the Northern District of California, *On Command Video Corp. v. Columbia Pictures Industries,* 777 F. Supp. 787 (N.D. Cal. 1991), which held that when the relationship between the transmitter and the audience of a performance is commercial, the transmission is "to the public," *see Cablevision I,* 478 F. Supp. 2d at 623 (citing *On Command,* 777 F. Supp. at 790).

Finding that the operation of the RS-DVR would infringe plaintiffs' copyrights, the district court awarded summary judgment to plaintiffs and enjoined Cablevision from copying or publicly performing plaintiffs' copyrighted works "in connection with its proposed RS-DVR system," unless it obtained the necessary licenses. *Cablevision I,* 478 F. Supp. 2d at 624. Cablevision appealed.

DISCUSSION

We review a district court's grant of summary judgment de novo. *Bill Graham Archives v. Dorling Kindersley Ltd.,* 448 F.3d 605, 607 (2d Cir. 2006).

"Section 106 of the Copyright Act grants copyright holders a bundle of exclusive rights...." *Id.* at 607-08. This case implicates two of those rights: the right "to

reproduce the copyrighted work in copies," and the right "to perform the copyrighted work publicly." 17 U.S.C. § 106(1), (4). As discussed above, the district court found that Cablevision infringed the first right by 1) buffering the data from its programming stream and 2) copying content onto the Arroyo Server hard disks to enable playback of a program requested by an RS-DVR customer. In addition, the district court found that Cablevision would infringe the public performance right by transmitting a program to an RS-DVR customer in response to that customer's playback request. We address each of these three allegedly infringing acts in turn.

I. The Buffer Data

It is undisputed that Cablevision, not any customer or other entity, takes the content from one stream of programming, after the split, and stores it, one small piece at a time, in the BMR buffer and the primary ingest buffer. As a result, the information is buffered before any customer requests a recording, and would be buffered even if no such request were made. The question is whether, by buffering the data that make up a given work, Cablevision "reproduce[s]" that work "in copies," 17 U.S.C. § 106(1), and thereby infringes the copyright holder's reproduction right.

"Copies," as defined in the Copyright Act, "are material objects ... in which a work is fixed by any method ... and from which the work can be ... reproduced." *Id.* § 101. The Act also provides that a work is " 'fixed' in a tangible medium of expression

when its embodiment ... is sufficiently permanent or stable to permit it to be ... reproduced ... *for a period of more than transitory duration.*" *Id.* (emphasis added). We believe that this language plainly imposes two distinct but related requirements: the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement"). *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.02[B][3], at 8-32 (2007). Unless both requirements are met, the work is not "fixed" in the buffer, and, as a result, the buffer data is not a "copy" of the original work whose data is buffered.

The district court mistakenly limited its analysis primarily to the embodiment requirement. As a result of this error, once it determined that the buffer data was "[c]learly ... capable of being reproduced," i.e., that the work was embodied in the buffer, the district court concluded that the work was therefore "fixed" in the buffer, and that a copy had thus been made. *Cablevision I,* 478 F. Supp. 2d at 621-22. In doing so, it relied on a line of cases beginning with *MAI Systems Corp. v. Peak Computer Inc.,* 991 F.2d 511 (9th Cir. 1993). It also relied on the United States Copyright Office's 2001 report on the Digital Millennium Copyright Act, which states, in essence, that an embodiment is fixed "[u]nless a reproduction manifests itself so fleetingly that *it cannot be copied.*" U.S. Copyright Office,

DMCA Section 104 Report 111 (Aug. 2001) ("*DMCA Report*") (emphasis added), *available at* http:// www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1. pdf.

The district court's reliance on cases like *MAI Systems* is misplaced. In general, those cases conclude that an alleged copy is fixed without addressing the duration requirement; it does not follow, however, that those cases assume, much less establish, that such a requirement does not exist. Indeed, the duration requirement, by itself, was not at issue in *MAI Systems* and its progeny. As a result, they do not speak to the issues squarely before us here: If a work is only "embodied" in a medium for a period of transitory duration, can it be "fixed" in that medium, and thus a copy? And what constitutes a period "of more than transitory duration"?

In *MAI Systems,* defendant Peak Computer, Inc., performed maintenance and repairs on computers made and sold by MAI Systems. In order to service a customer's computer, a Peak employee had to operate the computer and run the computer's copyrighted operating system software. *See MAI Sys.,* 991 F.2d at 513. The issue in *MAI Systems* was whether, by loading the software into the computer's RAM,[1] the repairman created a "copy" as

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[1] To run a computer program, the data representing that program must be transferred from a data storage medium (such as a floppy disk or a hard drive) to a form of Random Access Memory ("RAM") where the data can be processed. The data buffers at issue here are also a form of RAM.

defined in § 101. *See id.* at 517. The resolution of this issue turned on whether the software's embodiment in the computer's RAM was "fixed," within the meaning of the same section. The Ninth Circuit concluded that

> by showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Id. at 518 (quoting 17 U.S.C. § 101).

The *MAI Systems* court referenced the "transitory duration" language but did not discuss or analyze it. The opinion notes that the defendants "vigorously" argued that the program's embodiment in the RAM was not a copy, but it does not specify the arguments defendants made. *Id.* at 517. This omission suggests that the parties did not litigate the significance of the "transitory duration" language, and the court therefore had no occasion to address it. This is unsurprising, because it seems fair to assume that in these cases the program was embodied in the RAM for at least several minutes.

Accordingly, we construe *MAI Systems* and its progeny as holding that loading a program into a computer's RAM *can* result in copying that program.

We do not read *MAI Systems* as holding that, as a matter of law, loading a program into a form of RAM *always* results in copying. Such a holding would read the "transitory duration" language out of the definition, and we do not believe our sister circuit would dismiss this statutory language without even discussing it. It appears the parties in *MAI Systems* simply did not dispute that the duration requirement was satisfied; this line of cases simply concludes that when a program is loaded into RAM, the embodiment requirement is satisfied-an important holding in itself, and one we see no reason to quibble with here.[2]

At least one court, relying on *MAI Systems* in a highly similar factual setting, has made this point explicitly. In *Advanced Computer Services of*

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[2] The same reasoning also distinguishes this court's opinion in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998). Language in that opinion, taken out of context, suggests that the definition of "fixed" imposes only an embodiment requirement: "Under § 101's definition of 'copies,' a work satisfies the fixation requirement when it is fixed in a material object from which it can be perceived or communicated directly or with the aid of a machine." *Id.* at 702. Like the *MAI Systems* cases, *Matthew Bender* only addresses the embodiment requirement: specifically, whether West's copyrighted arrangement of judicial opinions was "embedded" in a CD-ROM compilation of opinions when the cases were normally arranged differently but could be manipulated by the user to replicate West's copyrighted arrangement. *Id.* at 703. The opinion merely quotes the duration language without discussing it, *see id.* at 702; that case therefore does not compel us to conclude that the definition of "fixed" does not impose a duration requirement.

Michigan, Inc. v. MAI Systems Corp., the district court expressly noted that the unlicensed user in that case ran copyrighted diagnostic software "for minutes or longer," but that the program's embodiment in the computer's RAM might be too ephemeral to be fixed if the computer had been shut down "within seconds or fractions of a second" after loading the copyrighted program. 845 F. Supp. 356, 363 (E.D. Va. 1994). We have no quarrel with this reasoning; it merely makes explicit the reasoning that is implicit in the other *MAI Systems* cases. Accordingly, those cases provide no support for the conclusion that the definition of "fixed" does not include a duration requirement. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Nor does the Copyright Office's 2001 DMCA Report, also relied on by the district court in this case, explicitly suggest that the definition of "fixed" does not contain a duration requirement. However, as noted above, it does suggest that an embodiment is fixed "[u]nless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated." *DMCA Report, supra*, at 111. As we have stated, to determine whether a work is "fixed" in a given medium, the statutory language directs us to ask not only 1) whether a work is "embodied" in that medium, but also 2) whether it is embodied in the medium "for a period of more than transitory

duration." According to the Copyright Office, if the work is capable of being copied from that medium *for any amount of time*, the answer to both questions is "yes." The problem with this interpretation is that it reads the "transitory duration" language out of the statute.

We assume, as the parties do, that the Copyright Office's pronouncement deserves only *Skidmore* deference, deference based on its "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). And because the Office's interpretation does not explain why Congress would include language in a definition if it intended courts to ignore that language, we are not persuaded.

In sum, no case law or other authority dissuades us from concluding that the definition of "fixed" imposes both an embodiment requirement and a duration requirement. *Accord CoStar Group Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (while temporary reproductions "may be made in this transmission process, they would appear not to be 'fixed' in the sense that they are 'of more than transitory duration'"). We now turn to whether, in this case, those requirements are met by the buffer data.

Cablevision does not seriously dispute that copyrighted works are "embodied" in the buffer. Data in the BMR buffer can be reformatted and transmitted to the other components of the RS-DVR

system. Data in the primary ingest buffer can be copied onto the Arroyo hard disks if a user has requested a recording of that data. Thus, a work's "embodiment" in either buffer "is sufficiently permanent or stable to permit it to be perceived, reproduced," (as in the case of the ingest buffer) "or otherwise communicated" (as in the BMR buffer). 17 U.S.C. § 101. The result might be different if only a single second of a much longer work was placed in the buffer in isolation. In such a situation, it might be reasonable to conclude that only a minuscule portion of a work, rather than "a work" was embodied in the buffer. Here, however, where every second of an entire work is placed, one second at a time, in the buffer, we conclude that the work is embodied in the buffer.

Does any such embodiment last "for a period of more than transitory duration"? *Id.* No bit of data remains in any buffer for more than a fleeting 1.2 seconds. And unlike the data in cases like *MAI Systems,* which remained embodied in the computer's RAM memory until the user turned the computer off, each bit of data here is rapidly and automatically overwritten as soon as it is processed. While our inquiry is necessarily fact-specific, and other factors not present here may alter the duration analysis significantly, these facts strongly suggest that the works in this case are embodied in the buffer for only a "transitory" period, thus failing the duration requirement.

Against this evidence, plaintiffs argue only that the duration is not transitory because the data persist "long enough for Cablevision to make reproductions from them." Br. of Pls.-Appellees the Cartoon Network et al. at 51. As we have explained above, however, this reasoning impermissibly reads the duration language out of the statute, and we reject it. Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not "embodied" in the buffers for a period of more than transitory duration, and are therefore not "fixed" in the buffers. Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term. Our resolution of this issue renders it unnecessary for us to determine whether any copies produced by buffering data would be de minimis, and we express no opinion on that question.

II. Direct Liability for Creating the Playback Copies

In most copyright disputes, the allegedly infringing act and the identity of the infringer are never in doubt. These cases turn on whether the conduct in question does, in fact, infringe the plaintiff's copyright. In this case, however, the core of the dispute is over the authorship of the infringing conduct. After an RS-DVR subscriber selects a program to record, and that program airs, a copy of the program-a copyrighted work-resides on the hard disks of Cablevision's Arroyo Server, its creation

unauthorized by the copyright holder. The question is *who* made this copy. If it is Cablevision, plaintiffs' theory of direct infringement succeeds; if it is the customer, plaintiffs' theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs.

Few cases examine the line between direct and contributory liability. Both parties cite a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995). In *Netcom*, a third-party customer of the defendant Internet service provider ("ISP") posted a copyrighted work that was automatically reproduced by the defendant's computer. The district court refused to impose direct liability on the ISP, reasoning that "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." *Id.* at 1370. Recently, the Fourth Circuit endorsed the *Netcom* decision, noting that

> to establish *direct* liability under ... the Act, something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner."

CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004).

Here, the district court pigeon-holed the conclusions reached in *Netcom* and its progeny as "premised on the unique attributes of the Internet." *Cablevision I*, 478 F. Supp. 2d at 620. While the *Netcom* court was plainly concerned with a theory of direct liability that would effectively "hold the entire Internet liable" for the conduct of a single user, 907 F. Supp. at 1372, its reasoning and conclusions, consistent with precedents of this court and the Supreme Court, and with the text of the Copyright Act, transcend the Internet. Like the Fourth Circuit, we reject the contention that "the *Netcom* decision was driven by expedience and that its holding is inconsistent with the established law of copyright," *CoStar*, 373 F.3d at 549, and we find it "a particularly rational interpretation of § 106," *id.* at 551, rather than a special-purpose rule applicable only to ISPs.

When there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made. There are only two instances of volitional conduct in this case: Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer's conduct in ordering that system to produce a copy of a specific program. In the case of a VCR, it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the

person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.

The district court emphasized the fact that copying is "instrumental" rather than "incidental" to the function of the RS-DVR system. *Cablevision I,* 478 F. Supp. 2d at 620. While that may distinguish the RS-DVR from the ISPs in *Netcom* and *CoStar,* it does not distinguish the RS-DVR from a VCR, a photocopier, or even a typical copy shop. And the parties do not seem to contest that a company that merely makes photocopiers available to the public on its premises, without more, is not subject to liability for direct infringement for reproductions made by customers using those copiers. They only dispute whether Cablevision is similarly situated to such a proprietor.

The district court found Cablevision analogous to a copy shop that makes course packs for college professors. In the leading case involving such a shop, for example, "[t]he professor [gave] the copyshop the materials of which the coursepack [was] to be made up, and the copyshop [did] the rest." *Princeton Univ. Press v. Mich. Document Servs.,* 99 F.3d 1381, 1384 (6th Cir. 1996) (en banc). There did not appear

to be any serious dispute in that case that the shop itself was directly liable for reproducing copyrighted works. The district court here found that Cablevision, like this copy shop, would be "doing" the copying, albeit "at the customer's behest." *Cablevision I,* 478 F. Supp. 2d at 620.

But because volitional conduct is an important element of direct liability, the district court's analogy is flawed. In determining who actually "makes" a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct. In cases like *Princeton University Press,* the defendants operated a copying device and sold the product they made using that device. *See* 99 F.3d at 1383 ("The corporate defendant ... is a commercial copyshop that reproduced substantial segments of copyrighted works of scholarship, bound the copies into 'coursepacks,' and sold the coursepacks to students...."). Here, by selling access to a system that automatically produces copies on command, Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor "makes" any copies when his machines are actually operated by his customers. *See Netcom,* 907 F. Supp. at 1369. Some courts have held to the contrary, but they do not explicitly explain why, and we find them

unpersuasive. *See, e.g., Elektra Records Co. v. Gem Elec. Distribs., Inc.*, 360 F. Supp. 821, 823 (E.D.N.Y. 1973) (concluding that, "regardless" of whether customers or defendants' employees operated the tape-copying machines at defendants' stores, defendant had actively infringed copyrights).

The district court also emphasized Cablevision's "unfettered discretion in selecting the programming that it would make available for recording." *Cablevision I*, 478 F. Supp. 2d at 620. This conduct is indeed more proximate to the creation of illegal copying than, say, operating an ISP or opening a copy shop, where all copied content was supplied by the customers themselves or other third parties. Nonetheless, we do not think it sufficiently proximate to the copying to displace the customer as the person who "makes" the copies when determining liability under the Copyright Act. Cablevision, we note, also has subscribers who use home VCRs or DVRs (like TiVo), and has significant control over the content recorded by these customers. But this control is limited to the channels of programming available to a customer and not to the programs themselves. Cablevision has no control over what programs are made available on individual channels or when those programs will air, if at all. In this respect, Cablevision possesses far less control over recordable content than it does in the VOD context, where it actively selects and makes available beforehand the individual programs available for viewing. For these reasons, we are not inclined to say that Cablevision, rather than the user, "does" the

copying produced by the RS-DVR system. As a result, we find that the district court erred in concluding that Cablevision, rather than its RS-DVR customers, makes the copies carried out by the RS-DVR system.

Our refusal to find Cablevision directly liable on these facts is buttressed by the existence and contours of the Supreme Court's doctrine of contributory liability in the copyright context. After all, the purpose of any causation-based liability doctrine is to identify the actor (or actors) whose "conduct has been so significant and important a cause that [he or she] should be legally responsible." W. Page Keeton et al., *Prosser and Keeton on Torts* § 42, at 273 (5th ed.1984). But here, to the extent that we may construe the boundaries of direct liability more narrowly, the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works.

Most of the facts found dispositive by the district court-e.g., Cablevision's "continuing relationship" with its RS-DVR customers, its control over recordable content, and the "instrumental[ity]" of copying to the RS-DVR system, *Cablevision I*, 478 F. Supp. 2d at 618-20-seem to us more relevant to the question of contributory liability. In *Sony Corp. of America v. Universal City Studios, Inc.*, the lack of an "ongoing relationship" between Sony and its VCR customers supported the Court's conclusion that it should not impose *contributory* liability on Sony for any infringing copying done by Sony VCR owners.

464 U.S. 417, 437-38 (1984). The *Sony* Court did deem it "just" to impose liability on a party in a "position to control" the infringing uses of another, but as a contributory, not direct, infringer. *Id.* at 437.

And asking whether copying copyrighted material is only "incidental" to a given technology is akin to asking whether that technology has "commercially significant noninfringing uses," another inquiry the *Sony* Court found relevant to whether imposing *contributory* liability was just. *Id.* at 442.

The Supreme Court's desire to maintain a meaningful distinction between direct and contributory copyright infringement is consistent with congressional intent. The Patent Act, unlike the Copyright Act, expressly provides that someone who "actively induces infringement of a patent" is "liable as an infringer," 35 U.S.C. § 271(b), just like someone who commits the underlying infringing act by "us[ing]" a patented invention without authorization, *id.* § 271(a). In contrast, someone who merely "sells ... a material or apparatus for use in practicing a patented process" faces only liability as a "contributory infringer." *Id.* § 271(c). If Congress had meant to assign direct liability to both the person who actually commits a copyright-infringing act and any person who actively induces that infringement, the Patent Act tells us that it knew how to draft a statute that would have this effect. Because Congress did not do so, the *Sony* Court concluded that "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another." 464 U.S. at 434.

Furthermore, in cases like *Sony*, the Supreme Court has strongly signaled its intent to use the doctrine of contributory infringement, not direct infringement, to "identify[ ] the circumstances in which it is just to hold one individual accountable for the actions of another." *Id.* at 435. Thus, although *Sony* warns us that "the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn," *id.* at 435 n.17 (internal quotation marks and citation omitted), that decision does not absolve us of our duty to discern where that line falls in cases, like this one, that require us to decide the question.

The district court apparently concluded that Cablevision's operation of the RS-DVR system would contribute in such a major way to the copying done by another that it made sense to say that Cablevision was a direct infringer, and thus, in effect, was "doing" the relevant copying. There are certainly other cases, not binding on us, that follow this approach. *See, e.g.*, *Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (noting that defendant ISP's encouragement of its users to copy protected files was "crucial" to finding that it was a direct infringer). We need not decide today whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy. We conclude only that on the facts of this case, copies produced by the RS-DVR system are "made" by the RS-DVR customer, and

Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability. Therefore, Cablevision is entitled to summary judgment on this point, and the district court erred in awarding summary judgment to plaintiffs.

III. Transmission of RS-DVR Playback

Plaintiffs' final theory is that Cablevision will violate the Copyright Act by engaging in unauthorized public performances of their works through the playback of the RS-DVR copies. The Act grants a copyright owner the exclusive right, "in the case of ... motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4). Section 101, the definitional section of the Act, explains that

> [t]o perform or display a work "publicly" means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

The parties agree that this case does not implicate clause (1). Accordingly, we ask whether these facts satisfy the second, "transmit clause" of the public performance definition: Does Cablevision "transmit ... a performance ... of the work ... to the public"? *Id.* No one disputes that the RS-DVR playback results in the transmission of a performance of a work-the transmission from the Arroyo Server to the customer's television set. Cablevision contends that (1) the RS-DVR customer, rather than Cablevision, does the transmitting and thus the performing and (2) the transmission is not "to the public" under the transmit clause.

As to Cablevision's first argument, we note that our conclusion in Part II that the customer, not Cablevision, "does" the copying does not dictate a parallel conclusion that the customer, and not Cablevision, "performs" the copyrighted work. The definitions that delineate the contours of the reproduction and public performance rights vary in significant ways. For example, the statute defines the verb "perform" and the noun "copies," but not the verbs "reproduce" or "copy." *Id.* We need not address Cablevision's first argument further because, even if we assume that Cablevision makes the transmission when an RS-DVR playback occurs, we find that the RS-DVR playback, as described here, does not involve the transmission of a performance "to the public."

The statute itself does not expressly define the term "performance" or the phrase "to the public." It does explain that a transmission may be "to the public ... whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times." *Id.* This plain language instructs us that, in determining whether a transmission is "to the public," it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is "capable of receiving" the performance being transmitted. The fact that the statute says "capable of receiving the performance," instead of "capable of receiving the transmission," underscores the fact that a transmission of a performance is itself a performance. *Cf. Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 197-98 (1931).

The legislative history of the transmit clause supports this interpretation. The House Report on the 1976 Copyright Act states that

> [u]nder the bill, as under the present law, a performance made available *by transmission to the public at large* is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of

> the *potential recipients* was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the *potential recipients of the transmission* represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service.

H.R. Rep. No. 94-1476, at 64-65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (emphases added).

Plaintiffs also reference a 1967 House Report, issued nearly a decade before the Act we are interpreting, stating that the same principles apply where the transmission is "*capable of reaching* different recipients at different times, as in the case of sounds or images stored in an information system and *capable of being performed or displayed* at the initiative of individual members of the public." H.R. Rep. No. 90-83, at 29 (1967) (emphases added). We question how much deference this report deserves. But we need not belabor the point here, as the 1967 report is consistent with both legislative history contemporaneous with the Act's passage and our own interpretation of the statute's plain meaning.

From the foregoing, it is evident that the transmit clause directs us to examine who precisely is "capable of receiving" a particular transmission of a performance. Cablevision argues that, because each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber,

one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS-DVR transmission. This argument accords with the language of the transmit clause, which, as described above, directs us to consider the potential audience of a given transmission. We are unpersuaded by the district court's reasoning and the plaintiffs' arguments that we should consider a larger potential audience in determining whether a transmission is "to the public."

The district court, in deciding whether the RS-DVR playback of a program to a particular customer is "to the public," apparently considered all of Cablevision's customers who subscribe to the channel airing that program and all of Cablevision's RS-DVR subscribers who request a copy of that program. Thus, it concluded that the RS-DVR playbacks constituted public performances because "Cablevision would transmit the *same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback." *Cablevision I*, 478 F. Supp. 2d at 623 (emphasis added). In essence, the district court suggested that, in considering whether a transmission is "to the public," we consider not the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., "the program") whose content is being transmitted.

We cannot reconcile the district court's approach with the language of the transmit clause. That clause speaks of people capable of receiving a particular "transmission" or "performance," and not of the potential audience of a particular "work." Indeed, such an approach would render the "to the public" language surplusage. Doubtless the *potential* audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court's interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after "performance."

On appeal, plaintiffs offer a slight variation of this interpretation. They argue that both in its real-time cablecast and via the RS-DVR playback, Cablevision is in fact transmitting the "same performance" of a given work: the performance of the work that occurs when the programming service supplying Cablevision's content transmits that content to Cablevision and the service's other licensees. *See* Br. of Pls.-Appellees Twentieth Century Fox Film Corp. et al. at 27 ("Fox Br.") ("The critical factor ... is that the same *performance* is transmitted to different subscribers at different times .... more specifically, the *performance* of that program *by HBO or another programming service*."(third emphasis added)).

Thus, according to plaintiffs, when Congress says that to perform a work publicly means to transmit ... a performance ... to the public, they really meant "transmit ... the 'original performance' ... to the public." The implication of this theory is that to determine whether a given transmission of a performance is "to the public," we would consider not only the potential audience of that transmission, but also the potential audience of any transmission of the same underlying "original" performance.

Like the district court's interpretation, this view obviates any possibility of a purely private transmission. Furthermore, it makes Cablevision's liability depend, in part, on the actions of legal strangers. Assume that HBO transmits a copyrighted work to both Cablevision and Comcast. Cablevision merely retransmits the work from one Cablevision facility to another, while Comcast retransmits the program to its subscribers. Under plaintiffs' interpretation, Cablevision would still be transmitting the performance to the public, solely because Comcast has transmitted the same underlying performance to the public. Similarly, a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public.

We do not believe Congress intended such odd results. Although the transmit clause is not a model

of clarity, we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission. Thus, HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO.

Furthermore, we believe it would be inconsistent with our own transmit clause jurisprudence to consider the potential audience of an upstream transmission by a third party when determining whether a defendant's own subsequent transmission of a performance is "to the public." In *National Football League v. PrimeTime 24 Joint Venture* (NFL), 211 F.3d 10 (2000), we examined the transmit clause in the context of satellite television provider PrimeTime, which captured protected content in the United States from the NFL, transmitted it from the United States to a satellite ("the uplink"), and then transmitted it from the satellite to subscribers in both the United States and Canada ("the downlink"). PrimeTime had a license to transmit to its U.S. customers, but not its Canadian customers. It argued that although the downlink transmission to its Canadian subscribers was a public performance, it could not be held liable for that act because it occurred entirely outside of the United States and therefore was not subject to the strictures of the Copyright Act. It also argued that the uplink transmission was not a public performance because it was a transmission to a single satellite. *See id.* at 12.

The *NFL* court did not question the first assumption, but it flatly rejected the second on a specific and germane ground:

> We believe the most logical interpretation of the Copyright Act is to hold that a public performance or display includes each step in the process by which a protected work wends its way to its audience. Under that analysis, it is clear that PrimeTime's uplink transmission of signals captured in the United States is a step in the process by which NFL's protected work wends its way *to a public audience.*

Id. at 13 (emphasis added) (internal quotation and citation omitted). Thus, while the uplink transmission that took place in the United States was not, in itself, "to the public," the *NFL* court deemed it so because it ultimately resulted in an undisputed public performance. Notably, the *NFL* court did not base its decision on the fact that an upstream transmission by another party (the NFL) might have been to the public. Nor did the court base its decision on the fact that Primetime simultaneously transmitted a performance of the work to the public in the United States. Because *NFL* directs us to look downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a public performance, we reject plaintiffs' contention that we examine the potential recipients of the content provider's initial transmission to

determine who is capable of receiving the RS-DVR playback transmission.

Plaintiffs also rely on *NFL* for the proposition that Cablevision publicly performs a work when it splits its programming stream and transmits the second stream to the RS-DVR system. Because *NFL* only supports that conclusion if we determine that the final transmission in the chain (i.e., the RS-DVR playback transmission) is "to the public," plaintiffs' reliance on *NFL* is misplaced. *NFL* dealt with a chain of transmissions whose final link was undisputedly a public performance. It therefore does not guide our current inquiry.

In sum, none of the arguments advanced by plaintiffs or the district court alters our conclusion that, under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is "to the public." And because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.

Plaintiffs contend that it is "wholly irrelevant, in determining the existence of a public performance, whether 'unique' *copies* of the same work are used to make the transmissions." Fox Br. at 27. But plaintiffs cite no authority for this contention. And

our analysis of the transmit clause suggests that, in general, any factor that limits the *potential* audience of a transmission is relevant.

Furthermore, no transmission of an audiovisual work can be made, we assume, without using a copy of that work: to transmit a performance of a movie, for example, the transmitter generally must obtain a copy of that movie. As a result, in the context of movies, television programs, and other audiovisual works, the right of reproduction can reinforce and protect the right of public performance. If the owner of a copyright believes he is injured by a particular transmission of a performance of his work, he may be able to seek redress not only for the infringing transmission, but also for the underlying copying that facilitated the transmission. Given this interplay between the various rights in this context, it seems quite consistent with the Act to treat a transmission made using Copy A as distinct from one made using Copy B, just as we would treat a transmission made by Cablevision as distinct from an otherwise identical transmission made by Comcast. Both factors-the identity of the transmitter and the source material of the transmission-limit the potential audience of a transmission in this case and are therefore germane in determining whether that transmission is made "to the public."

Indeed, we believe that *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), relied on by both plaintiffs and the district court, supports our decision to accord

significance to the existence and use of distinct copies in our transmit clause analysis. In that case, defendant operated a video rental store, Maxwell's, which also housed a number of small private booths containing seats and a television. Patrons would select a film, enter the booth, and close the door. An employee would then load a copy of the requested movie into a bank of VCRs at the front of the store and push play, thereby transmitting the content of the tape to the television in the viewing booth. *See id.* at 156-57.

The Third Circuit found that defendants' conduct constituted a public performance under both clauses of the statutory definition. In concluding that Maxwell's violated the transmit clause, that court explicitly relied on the fact that defendants showed the same copy of a work seriatim to its clientele, and it quoted a treatise emphasizing the same fact:

> Professor Nimmer's examination of this definition is particularly pertinent: "*if the same copy*... of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance." 2 M. Nimmer, § 8.14[C][3], at 8-142 (emphasis in original).... Although Maxwell's has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.

Id. at 159 (first omission in original).

Unfortunately, neither the *Redd Horne* court nor Prof. Nimmer explicitly explains *why* the use of a distinct copy affects the transmit clause inquiry. But our independent analysis confirms the soundness of their intuition: the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made "to the public." Plaintiffs' unsupported arguments to the contrary are unavailing.

Given that each RS-DVR transmission is made to a given subscriber using a copy made by that subscriber, we conclude that such a transmission is not "to the public," without analyzing the contours of that phrase in great detail. No authority cited by the parties or the district court persuades us to the contrary.

In addition to *Redd Horne,* the district court also cited and analyzed *On Command Video Corp. v. Columbia Pictures Industries,* 777 F. Supp. 787 (N.D. Cal. 1991), in its transmit clause analysis. In that case, defendant On Command developed and sold "a system for the electronic delivery of movie video tapes," which it sold to hotels. *Id.* at 788. The hub of the system was a bank of video cassette players, each containing a copy of a particular movie. From his room, a hotel guest could select a movie via remote control from a list on his television. The corresponding cassette player would start, and its output would be transmitted to that guest's room. During this playback, the movie selected was

unavailable to other guests. *See id.* The court concluded that the transmissions made by this system were made to the public "because the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, 'public' one regardless of where the viewing takes place." *Id.* at 790.

Thus, according to the *On Command* court, any commercial transmission is a transmission "to the public." We find this interpretation untenable, as it completely rewrites the language of the statutory definition. If Congress had wished to make all commercial transmissions public performances, the transmit clause would read: "to perform a work publicly means ... to transmit a performance for commercial purposes." In addition, this interpretation overlooks, as Congress did not, the possibility that even non-commercial transmissions to the public may diminish the value of a copyright. Finally, like *Redd Horne, On Command* is factually distinguishable, as successive transmissions to different viewers in that case could be made using a single copy of a given work. Thus, at the moment of transmission, any of the hotel's guests was capable of receiving a transmission made using a single copy of a given movie. As a result, the district court in this case erred in relying on *On Command.*

Plaintiffs also rely on *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277 (3d Cir. 1991), in which the Third Circuit interpreted § 106(3) of the Copyright Act, which gives the copyright holder the

exclusive right "to distribute copies ... of the copyrighted work *to the public*,"17 U.S.C. § 106(3) (emphasis added). The court concluded that "even one person can be the public *for the purposes of section 106(3)*." *Ford*, 930 F.2d at 299 (emphasis added). Commentators have criticized the *Ford* court for divesting the phrase "to the public" of "all meaning whatsoever," 2 Nimmer & Nimmer, *supra*, § 8.11[A], at 8-149, and the decision does appear to have that result. Whether this result was justified in the context of the distribution right is not for us to decide in this case. We merely note that we find no compelling reason, in the context of the transmit clause and the public performance right, to interpret the phrase "to the public" out of existence.

In sum, we find that the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons "capable of receiving" it, to determine whether that transmission is made "to the public." Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances "to the public," and therefore do not infringe any exclusive right of public performance. We base this decision on the application of undisputed facts; thus, Cablevision is entitled to summary judgment on this point.

This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of

content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.

In sum, because we find, on undisputed facts, that Cablevision's proposed RS-DVR system would not directly infringe plaintiffs' exclusive rights to reproduce and publicly perform their copyrighted works, we grant summary judgment in favor of Cablevision with respect to both rights.

CONCLUSION

For the foregoing reasons, the district court's award of summary judgment to the plaintiffs is REVERSED and the district court's injunction against Cablevision is VACATED. The case is REMANDED for further proceedings consistent with this opinion.

Appendix B

United States District Court,
Southern District New York.

TWENTIETH CENTURY FOX FILM CORPORATION et al., Plaintiffs,
v.
CABLEVISION SYSTEMS CORPORATION et ano, Defendants.
The Cartoon Network LP, LLLP, et ano, Plaintiffs,
v.
CSC Holdings, Inc. et ano, Defendants,
etc.
Nos. 06 Civ. 3990(DC), 06 Civ. 4092(DC).

March 22, 2007.

OPINION

CHIN, District Judge.

In March 2006, Cablevision Systems Corporation ("Cablevision") announced that it would be rolling out a "new Remote-Storage DVR System" (the "RS-DVR"). The RS-DVR is intended for Cablevision customers who do not have a digital video recorder ("DVR") in their homes. The RS-DVR would permit these customers to record programs on central servers at Cablevision's facilities and play the programs back for viewing at home.

Cablevision has not obtained permission from plaintiffs, the owners of the copyrighted programs, to reproduce and transmit the programs through its

proposed RS-DVR. It contends that a license is not required because the customer, not Cablevision, chooses the content and records the programs for personal viewing. It argues that, under *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), a company cannot be liable for infringement merely because it supplies Betamax recorders, video cassette recorders ("VCRs"), or DVRs to consumers to record television programs for in-home, personal viewing, and it further contends that its RS-DVR is no different from these traditional devices.

In these related cases, plaintiffs sue Cablevision and its parent, CSC Holdings, Inc. ("CSC"), for copyright infringement, seeking a declaratory judgment that Cablevision's RS-DVR would violate their copyrights and an injunction enjoining defendants from rolling out the RS-DVR without copyright licenses. Defendants counterclaim for a declaratory judgment holding that the RS-DVR would not infringe on plaintiffs' copyrights. The parties' cross-motions for summary judgment are before the Court.

Plaintiffs' motions are granted and defendants' motion is denied, for I conclude that Cablevision, and not just its customers, would be engaging in unauthorized reproductions and transmissions of plaintiffs' copyrighted programs under the RS-DVR. Indeed, the RS-DVR is not a stand-alone machine that sits on top of a television. Rather, it is a complex system that involves an ongoing relationship between Cablevision and its customers, payment of monthly fees by the customers to Cablevision,

ownership of the equipment remaining with Cablevision, the use of numerous computers and other equipment located in Cablevision's private facilities, and the ongoing maintenance of the system by Cablevision personnel. Accordingly, judgment will be entered in favor of plaintiffs.

STATEMENT OF THE CASE

A. *The Facts*

As the parties agree, the facts are largely undisputed. (Tr. 9, 194).[1]

1. *The Parties*

Plaintiffs, counterclaim-defendants, and third-party defendants are The Cartoon Network LP, LLLP; Cable News Network LP, LLLP; Turner Broadcasting System, Inc.; Turner Network Sales, Inc.; Turner Classic Movies, L.P., LLLP; Turner Network Television LP, LLLP; Twentieth Century Fox Film Corporation; Universal City Studios Productions LLLP, Paramount Pictures Corporation; Disney Enterprises, Inc.; CBS Broadcasting Companies, Inc.; and NBC Studios, Inc. (collectively, "plaintiffs"). Plaintiffs own the copyrights to numerous copyrighted entertainment programs, including movies, television series, news and sports shows, and cartoons, which are shown on television and also used (or licensed for use) in other media,

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[1] "Tr." refers to the transcript of the hearing and oral argument on October 31 and November 1, 2006.

including the Internet, DVDs, and cellular phone technology. Defendants, counter-claim plaintiffs, and third-party plaintiffs are Cablevision and CSC ("defendants"). They own and operate cable television systems, primarily in the New York City metropolitan area. Cablevision provides its customers with a wide variety of programs, including programs owned by plaintiffs, pursuant to negotiated and statutory (i.e., required by law) licenses or "affiliation agreements." (*See, e.g.,* Turner Exs. 25, 26).

None of the licenses between plaintiffs and Cablevision authorizes Cablevision to transmit or reproduce plaintiffs' copyrighted programming through the RS-DVR. (Tr. 199-201).

2. *Cable Television*

Television involves the transmission of audio and video signals-"a moving picture, plus sound." (Horowitz Report ¶ 16). "Broadcast television" is transmitted over public airwaves and can be received with only a television set and an antenna. (*Id.* ¶ 30). "Cable television" is transmitted via a coaxial cable that is connected to a television set, usually through a "set-top box" provided by a cable company. (*Id.* ¶ 31). Cable companies offer customers, for a fee, a number of programming channels, including basic cable (*e.g.,* TNT and Disney Channel) and premium cable (*e.g.,* HBO and Showtime) channels. (*Id.* ¶ 32; Fox Statement of Facts ("Fox SOF") ¶¶ 2-4). Basic and premium cable channels, along with broadcast

television stations, are linear channels, meaning that they televise programs sequentially at specified times of the day. (*Id.* ¶ 4).

i. ***Delivery of Cable Programming***

Traditionally, television signals were transmitted in analog form. (Horowitz Report ¶ 19). In other words, the signals were transmitted as a series of continuous waves. (*Id.*). Today, television signals are increasingly delivered in digital form. (*See id.* ¶ 35). Digital signals are transmitted as compressed data in the form of binary digits, or "bits." (*Id.* ¶¶ 19-20, 38). The number of bits that can be sent in a second is known as the "bitrate." (*Id.* ¶ 41). Digital signals allow for a greater variety in television programming-because more signals can be transmitted in the same space-as well as interactive services and, often, better audio and image quality than analog television. (*Id.* ¶¶ 39-42). The RS-DVR would be offered as part of Cablevision's digital cable service.

Digital cable delivery starts with programming owners sending feeds of their content to the cable company, which collects the feeds at a "head-end," a central facility that houses much of the software and hardware necessary to operate a cable system. (Hartson Report ¶ 18; Mitchko Decl. ¶ 12; Tr. 18). For linear channels, the cable company collects all of the feeds into an "aggregated programming stream" ("APS"). (Tr. 18). The APS is composed of packets of

data, each 188 bytes in size.[2] (*Id.*; Horowitz Report ¶ 46). Each packet is tagged with a "program identifier" ("PID") indicating the program to which it belongs. (Horowitz Report ¶ 47).

The APS is sent from the head-end to customers' homes through a process known as Quadrature Amplitude Modulation ("QAM"); the devices used to accomplish this process are called QAM modulators. (Hartson Report ¶ 29). QAM converts the digital signals into radio frequency ("RF") signals, which are more robust and better suited for transmission along a cable system's coaxial cable lines. (Tr. 19-20). The RF signals are sent over the coaxial network (the "RF Distribution Network"), which routes the signals to the various "nodes" or service groups-smaller cable systems connecting a group of homes-comprising the cable system. (Hartson Report ¶ 31). Each node is serviced by a particular QAM modulator. (Tr. 19-21). The RF signals are typically then routed to the customer's digital set-top box. (Hartson Report ¶ 32). The packets of the APS are filtered according to their PIDs and reassembled into a single program transport stream to be decrypted, decoded,[3] and displayed. (Horowitz Report ¶ 47). To limit access to certain programming such as premium channels, the cable company encrypts the packets in the APS.(*Id.*

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[2] One byte is equal to 8 bits.

[3] A digital television can directly receive digital signals. An analog television, however, cannot; it must have a decoding device-e.g., a set-top box-to convert digital signals into analog. (Hartson Report ¶ 19).

¶ 56). The set-top box has decryption hardware that "unlocks" the encrypted packets. (*Id.*).

ii. ***Video-on-Demand***

Cable companies also provide certain services on an individual customer basis. Video-on-Demand ("VOD") is one such service. VOD allows a customer, using an on-screen menu and the remote control, to view at any time programming selected by the cable company. (Hartson Report ¶ 39; Horowitz Report ¶¶ 57-58, 60). Pursuant to licenses negotiated with the programming owners, the cable company receives programming for VOD exhibition at its head-end, where the content is stored on computers. (Hartson Report ¶ 39). The cable company delivers the VOD content on extra channel frequencies that are not being used for linear programming. (Horowitz Report ¶ 59).

VOD also requires a "reverse" channel for each customer, so that the customer can communicate with the cable company to select the desired programming and control the playback (i.e. rewind, fast-forward, and pause). (*Id.* ¶ 60). These playback control functions are known as "trick modes." (Gilmer Report at 10). Cablevision offers VOD to its digital cable customers, pursuant to licensing agreements it has with the programming owners. (Turner Statement of Facts ("Turner SOF") ¶¶ 24-25, 38).

3. *Recording Television Programming: VCRs and DVRs*

VCRs, introduced for home use more than 25 years ago, provided the first practical means for television viewers to record programming. (Hartson Report ¶ 33; *see* Tr. 122-23). VCRs capture programming from television signals and record it onto magnetic tape housed in a video cassette. (Hartson Report ¶ 33). DVRs were introduced to consumers in 1999 and are increasingly being used in place of VCRs to record television programming. (*Id.* ¶ 34). DVRs record programming to a hard-drive based digital storage medium, rather than to a video cassette. (*Id.* ¶ 35).

Many cable companies offer "set-top storage DVRs" ("STS-DVRs"), which combine the function of a standard cable set-top box and a DVR. (*Id.* ¶ 36; *see* Tr. 124-25). An STS-DVR can record digital programming streams directly (*i.e.*, without decoding them) onto a hard drive contained within the box. (Hartson Report ¶ 36). It may incorporate two tuners, allowing the customer to watch live programming on one channel and record on another, or record two channels simultaneously. (*Id.*). Customers with STS-DVRs use an on-screen program guide to select the programs they wish to record. (*Id.* ¶ 35). Once recorded, programming is stored on the box's hard drive and is available for playback. (*Id.*). The customer can use certain trick modes to control playback. (*Id.*). The amount of programming that can be stored depends on the size of the box's hard drive. (*Id.*).

Cablevision has offered Cablevision-owned STS-DVRs to its digital cable customers, for an additional fee, since November 2004. (Answer ¶ 18; Mitchko Decl. ¶ 6). A program may be recorded only if it is included within the tier of linear programming for which the customer has paid (the customer's "subscription programming"). (*Id.*). Customers cannot, for example, use the STS-DVR to record pay-per-view or VOD programming. (Mitchko Decl. ¶ 6).

4. *Cablevision's RS-DVR*

i. ***Overview of the RS-DVR***

The RS-DVR is a type of network DVR ("nDVR"). (Hartson Report ¶ 47). An nDVR stores recorded programming in a central cable facility, rather than on the hard disk of the set-top box in the customer's home. (*Id.* ¶ 43). The RS-DVR would store recorded programming remotely on computer servers located at Cablevision head-ends. (Mitchko Decl. ¶ 12). The RS-DVR uses various components, including: (1) a remote control-the same one offered with Cablevision's STS-DVRs; (2) an on-screen program guide populated by data stored in a server located at the head-end-the same interface used by Cablevision's other digital cable customers; (3) a set-top box located in the customer's home; (4) "a network of wires, relays, switches, and RF devices connecting the set-top box ... to Cablevision's cable television system"; and (5) computer hardware and software located at Cablevision's head-ends. (*Id.* ¶

13). Cablevision would charge its customers an additional fee for their use of the RS-DVR. (Answer ¶ 18).

Recorded programming would be stored on servers designed by Arroyo Video Solutions, Inc. (each, an "Arroyo server") containing multiple hard disk drives. (Mitchko Decl. ¶ 14). Each customer would be allotted a specified amount of storage capacity on one of those hard drives; his or her recorded programming would be stored in that hard drive space and available only to that customer. (*Id.*). Cablevision determines the amount of memory allotted to each customer; initially, Cablevision contemplated allocating 80 megabytes of memory to each customer, but later decided on 160 megabytes. (Tr. 190-91).[4] A recorded program would be stored indefinitely on the Arroyo server until selected for deletion by the customer or automatically overwritten by Cablevision on a first-in, first-out basis to make room for another program. (Hartson Report ¶ 104).

As the above description makes clear, the RS-DVR is not a single piece of equipment. Rather, it is a complex system requiring numerous computers, processes, networks of cables, and facilities staffed by personnel twenty-four hours a day and seven days a week. (Tr. 182-86; *see also id.* at 113). Cablevision's expert estimated that some ten "boxes" would be

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[4] In fact, Cablevision has considered offering customers for an additional fee additional storage capacity. (*See* Tr. 190-91; Turner Ex. 43).

involved for each Arroyo server. (*Id.* at 182-83). Plaintiffs' expert testified that the RS-DVR "service"-or at least some of it-was housed in a "big room" at Cablevision's facilities, approximately 60 feet by 60 feet. (*Id.* at 80-81). Moreover, in general a Cablevision RS-DVR customer would not be able to walk into Cablevision's facilities and touch the RS-DVR system. (*Id.* at 186).

As for programming content, Cablevision determines the programming that will be available for recording with the RS-DVR. (*Id.* at 186-87). In other words, an RS-DVR subscriber would only be able to record programming made available by Cablevision. (*Id.*). Cablevision has elected to make all 170 channels received by Cablevision available to RS-DVR subscribers, but that is Cablevision's decision. (*Id.* at 64, 186-87; *see also id.* at 134). As a technical matter, Cablevision could choose to exclude certain channels. Indeed, Cablevision had earlier considering limiting the RS-DVR service to twelve channels or fifty channels before deciding on all 170 channels. (*Id.* at 188-89; Turner Ex. 41).

ii. ***The RS-DVR Technology***

The starting point of the RS-DVR is the BarcoNet, a closed circuit network that receives Cablevision's programming content-the APS-for distribution. (Hartson Report ¶ 28; Lechner Report ¶ 25; Tr. 132-36). Ordinarily, when linear programming is delivered to customers, the APS flows from the BarcoNet to the QAM modulators for real-time

distribution over the coaxial network to customers. (Tr. 19). For the RS-DVR to work, however, the APS must be split off from the BarcoNet into two streams, with the second stream sent to a device called the Big Band Broadband Multimedia Router ("BMR"). (*Id.;* Mitchko Decl. ¶ 26). The BMR does several things. Through a process known as clamping, the BMR converts the bitrate of the stream from the BarcoNet into one that is more efficient.[5] (Gilmer Report at 7). In the process of clamping, portions of programming are placed into the BMR's "buffer" memory. (Hartson Report ¶ 97).

An explanation of "buffers" is necessary here. All digital devices, including digital television, utilize transient data buffers, which are regions of memory that temporarily hold data. (Horowitz Report ¶ 50). This is a form of random access memory-RAM. (Tr. 65). Data is buffered-*i.e.*, the data temporarily resides in these buffers-as it moves from some source and is processed and transferred to its final destination. (Horowitz Report ¶ 50). Buffering takes place at several points during the operation of the RS-DVR, the first of which occurs when the programming stream arrives at the BMR. (Tr. 64-65).

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[5] The stream from the BarcoNet is variable bitrate ("VBR"), which means that the number of bits per second consumed by a particular television channel will vary. (Gilmer Report at 7). The BMR converts the VBR stream into a constant bit rate ("CBR") stream.

The BMR also converts the APS into a number of single program transport streams, meaning that there is only one channel in any given stream. (Gilmer Report at 7). Additionally, the BMR converts the packets comprising these streams into larger packets known as User Datagram Protocol ("UDP") packets. (Tr. 24). This process is called "encapsulation." (*Id.*). Each UDP packet is assigned a port number identifying the television channel to which it belongs. (*Id.* at 25; Gilmer Report at 7). From the BMR, the streams of programming travel to a "switch," which simply routes the packets from one port to another. (Hartson Report ¶ 55).

The streams are then fed into the Arroyo servers-the heart of the RS-DVR, for it is on these servers that programming is recorded and stored for later playback. (Lechner Report ¶ 2.5). Each Arroyo server can service up to ninety-six Cablevision customers. (Tr. 30, 36). The servers have two major functions: ingestion and retransmission. (Tr. 30-31). The latter comes into play at the playback stage, discussed infra. The first function involves the process by which programming is recorded. Upon receiving programming streams, the Arroyo servers "read" the streams into buffer memory. (*Id.* at 35; Hartson Report ¶ 56). This buffer is called the "primary ingest buffer." (Hartson Report ¶ 56; Tr. 35). Each packet of programming is stored in the primary ingest buffer for up to a tenth of a second. (Tr. 33-35, 106-10). The primary ingest buffer has the capacity to hold 6,000 packets at a time-the equivalent of about three frames of video. (*Id.*; *see also id.* 163-

64). This means that at any given time, an Arroyo server will have in its buffer memory three frames of video from each of the linear channels carried by Cablevision. (*Id.* at 36, 109-10). This buffering takes place automatically-before any customer requests anything-so that if a customer requests that a particular program be recorded, the appropriate packets can be retrieved from buffer memory and copied to the customer's hard drive storage space. (Lechner Report ¶ 2.5; Tr. 66, 184-85).

iii. ***Recording***

An RS-DVR customer can request that a program be recorded from any linear channel within his or her subscription programming in one of two ways. (Mitchko Decl. ¶ 18). First, the customer can use the remote control to navigate the on-screen program guide and schedule a future program to record. (*Id.*). The customer scrolls through a list of channels and programs, then presses the "record" button. (*Id.*). Second, while watching a program, the customer can simply press "record" on the remote control. (*Id.* ¶ 19).

When the set-top box receives the record command from the remote control, it relays the command to the "Application Data Server" ("ADS") server located at the head-end. (Hartson Report ¶ 57). The ADS verifies that: (1) the customer is authorized to receive the program in question; (2) the customer has not already requested that the program be recorded; (3) the customer has available hard drive storage space;

(4) the recording of the program will not result in the customer's recording more than two programs at the same time; and (5) the customer is not trying to record a program that is not within his or her subscription programming. (Mitchko Decl. ¶ 22). If any of the above criteria are not met, the RS-DVR causes an error message to be displayed on the customer's television screen with the appropriate remedial steps for the customer to take. (*Id.* ¶ 23).

Upon satisfaction of the above criteria, the ADS queries the "Oracle Production Server" ("OPRD"), which maintains a list of programs that have been requested for recording. (Hartson Report ¶ 58). If the program has previously been requested, the OPRD will send the "asset ID," a unique code for the program, to the ADS. (*Id.*). If the program has not been requested, the ADS communicates with another application so that an asset ID can be generated, by a server called the "Asset Management and Publishing System" ("AMP"), for that program. (*Id.* ¶ 59; Tr. 41). The AMP directs the newly created asset ID to the ADS, which notifies the OPRD. (Hartson Report ¶¶ 60-61). The asset ID is then added to the OPRD's list of programs to be recorded. (*Id.* ¶ 61). Once the ADS has the asset ID for a program, it communicates with the "Vitria" server. (*Id.* ¶ 62; Tr. 41). This server aggregates recording requests and is the only server to communicate directly with the Arroyo server. (Hartson Report ¶ 62; Tr. 41). When the time comes for a program selected for recording to run, the Vitria server sends a unified list of all the requests for that program to

the ingestion component of the Arroyo server, which is holding the packets for that program in its buffer memory. (Hartson Report ¶¶ 58-62; Tr. 40-42).

Once the Arroyo server receives the list of recording requests from the Vitria server, it finds the packets for that particular program, which are sitting in the primary ingest buffer, then copies them to another place in its memory called the secondary ingest buffer. (Hartson Report ¶¶ 65; Tr. 42-44). A copy of the program is made for each customer that requested that the program be recorded. (Hartson Report ¶ 66; Mitchko Decl. ¶ 29). From the secondary ingestion buffer, a complete copy of the program is written to the hard drive of each requesting customer. (Hartson Report ¶¶ 63-67; Tr. 42-44). For instance, if 1000 customers want to record a specific episode of HBO's "The Wire," 1000 separate copies of that episode are made, each copy uniquely associated by identifiers with the set-top box of the requesting customer. (*See* Mitchko Decl. ¶ 29). Once a copy of the program is made to the customer's hard drive, the Arroyo server initiates a series of messages to inform the other components of the RS-DVR that the program has been recorded, is available for playback, and should appear as such on the customer's on-screen program guide. (Hartson Report ¶ 68; Mitchko Decl. ¶ 35; Tr. 44-45). The customer can request and control playback of the program, but the customer cannot copy it to an attached external disk drive or VCR, as can be done with a program recorded with a set-top DVR. (Tr. 46-47).

If no customer requests that a particular program be recorded, no copy of that program is made in the hard drives on the Arroyo server. (Mitchko Decl. ¶ 30). Portions of programming are copied to buffer memory in the BMR and to the primary ingest buffer, regardless of whether a customer requests that it be recorded. (Hartson Report ¶¶ 97-98).

iv. ***Playback***

When customers want to play back recorded programming, they use their remote control to select the program from the on-screen program guide's list of recorded programs. (Mitchko Decl. ¶ 35). This initiates the retransmission function of the Arroyo servers. (Tr. 47). The set-top box communicates with a server called the "Enterprise Session Resource Manager" ("eSRM"), which manages the playback process. (Hartson Report ¶¶ 69-76; Tr. 47-49). The eSRM sends messages to the other components of the RS-DVR to verify that the playback command is valid, determine the location of the recorded program, and reserve space, or "bandwidth," in the QAM so that the program can be streamed to the customer's set-top box. (Hartson Report ¶¶ 71-74; Mitchko Decl. ¶¶ 37-39; Tr. 47-49). The Arroyo server locates the copy of the program stored on the customer's hard drive, reads it into buffer memory-here, the "streaming buffer"-and sends it to the Ciena switch, which routes the programming stream to the appropriate QAM serving that customer. (Tr. 49-50). The stream containing the program is transmitted to every home in the node where the

requesting customer is located, but only the requesting set-top box is provided the key for decrypting the stream for viewing. (Hartson Report ¶ 75; Mitchko Decl. ¶ 42; Tr. 50, 76).

Once the playback session has started, the customer can use trick modes to pause, fast-forward, and rewind the program. (Hartson Report ¶ 76). To enable these trick modes, the RS-DVR automatically places one to two seconds worth of video data from the programming stream into buffer memory. (Hartson Report ¶ 101). If too many customers in a particular node are using their RS-DVR at the same time, the system will not be able to handle all of them and there will be the equivalent of a "busy signal" as an error message will be displayed. (Tr. 79-80).

B. ***Procedural History***

The first of these two related cases was filed on May 24, 2006, and the second was filed on May 26, 2006. Plaintiffs in both actions seek declaratory and injunctive relief to prevent Cablevision from rolling out the RS-DVR without proper licenses for the use of plaintiffs' copyrighted works.[6]

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[6] Although the complaint in the first of these cases (the "*Fox*" case) is entitled "Complaint for Declaratory and Injunctive Relief," the prayer for relief includes a request for damages. (*Fox* Compl. 10). As the RS-DVR roll-out has been stayed and the complaint does not allege damages, the Court assumes the *Fox* plaintiffs are not actually seeking damages.

By stipulation so ordered June 7, 2006, plaintiffs agreed that they were asserting only claims of direct copyright infringement, and defendants agreed that they would not assert a "fair use" defense. Defendants further agreed not to proceed with the roll-out of the RS-DVR pending resolution by the Court of the question of liability in this action.

After conducting limited discovery, the parties filed cross-motions for summary judgment. I conducted a hearing and heard oral argument on October 31 and November 1, 2006. The parties agreed that the Court would be able to assess credibility and make findings as to the expert testimony presented at the hearing. They further agreed that following the hearing, the Court would have a sufficient record upon which to enter judgment in this case, unless the Court determined that there were disputed issues of material fact that prevented entry of judgment.

DISCUSSION

A. *Summary Judgment Standard*

The standards governing motions for summary judgment are well-settled. A court may grant summary judgment only where there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). Accordingly, the court's task is not to "weigh the evidence and determine the truth of the matter but

to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). To create an issue for trial, there must be sufficient evidence in the record to support a jury verdict in the nonmoving party's favor. *See id.*

To defeat a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. As the Supreme Court stated in Anderson, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). The nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth "concrete particulars" showing that a trial is needed. *Nat'l Union Fire Ins. Co. v. Deloach*, 708 F. Supp. 1371, 1379 (S.D.N.Y. 1989) (quoting *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) (internal quotations omitted)). Accordingly, it is insufficient for a party opposing summary judgment "merely to assert a conclusion without supplying supporting arguments or facts." *BellSouth Telecomms., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) (internal quotations omitted).

A court faced with cross-motions for summary judgment need not "grant judgment as a matter of law for one side or the other," but "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under

consideration." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993) (quoting *Schwabenbauer v. Bd. of Ed. of Olean*, 667 F.2d 305, 313-14 (2d Cir. 1981) (internal citations omitted)).

B. *Copyright Infringement*

The Copyright Act of 1976 (the "Copyright Act"), 17 U.S.C. § 101 *et seq.*, confers upon copyright owners the exclusive rights to, among other things, "reproduce the copyrighted work in copies" and "in the case of ... audiovisual works, to perform the copyrighted work publicly." *Id.* §§ 106(1) and (4) (2002). "To establish a claim of copyright infringement, a plaintiff must establish (1) ownership of a valid copyright and (2) unauthorized copying or a violation of one of the other exclusive rights afforded copyright owners pursuant to the Copyright Act." *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 232 (S.D.N.Y. 2001) (citing *Twin Peaks Prods. v. Publ'ns Int'l. Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993)); *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

Here, it is undisputed that plaintiffs own valid copyrights for the television programming at issue. The only question before the Court is whether Cablevision is "copying" plaintiffs' copyrighted programming or otherwise violating plaintiffs' rights under the Copyright Act.

Plaintiffs allege that Cablevision, through its RS-DVR, directly infringes upon their copyrights in two

ways: one, Cablevision makes unauthorized copies of plaintiffs' programming, in violation of plaintiffs' right to reproduce their work; and two, Cablevision makes unauthorized transmissions of plaintiffs' programming, in violation of plaintiffs' exclusive right to publicly perform their work. I address each argument in turn.

1. ***Is Cablevision Making Unauthorized Copies?***

According to plaintiffs, Cablevision makes multiple unauthorized copies of programming in two respects: (1) a complete copy of a program selected for recording is stored indefinitely on the customer's allotted hard drive space on the Arroyo server at Cablevision's facility; and (2) portions of programming are stored temporarily in buffer memory on Cablevision's servers.

i. ***Arroyo Server Copies***

Cablevision does not deny that these copies are made in the operation of the RS-DVR, but, as the parties agree, the question is *who* makes the copies. Cablevision sees itself as entirely passive in the RS-DVR's recording process-it is the customer, Cablevision contends, who is "doing" the copying. To Cablevision, the RS-DVR is a machine, just like a VCR, STS-DVR, or a photocopier. Relying on *Sony* and other cases, Cablevision argues that it cannot be liable for copyright infringement for merely providing customers with the machinery to make copies. At most, it contends, its role with respect to

the RS-DVR establishes indirect infringement, but plaintiffs have waived such a claim. (*See* June 7, 2006 Order). Plaintiffs, on the other hand, allege direct infringement-that is, they claim that it is Cablevision that is "doing" the copying here. Plaintiffs characterize the RS-DVR as a service-one that requires the continuing and active involvement of Cablevision.

I agree with plaintiffs. The RS-DVR is clearly a service, and I hold that, in providing this service, it is Cablevision that does the copying.

In *Sony,* programming owners sued Sony and others for copyright infringement based on defendants' marketing and sale of Betamax VCRs. The record showed that consumers primarily used VCRs for home "time-shifting"-the practice of recording a program to view it at a later time, then erasing it. The Supreme Court held that time-shifting is "fair use"[7] and does not violate the Copyright Act. 464

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[7] The "fair use" defense, set forth in § 107 of the Copyright Act, provides in relevant part:

> [T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used

U.S. at 456. The Court held that Sony's manufacture of Betamax VCRs therefore did not constitute contributory infringement.

Cablevision's reliance on *Sony* is misguided. First, Cablevision has waived any arguments based on fair use. (*See* June 7, 2006 Order). Second, apart from their time-shifting functions, the RS-DVR and the VCR have little in common, and the relationship between Cablevision and potential RS-DVR customers is significantly different from the relationship between Sony and VCR users.

A VCR is a stand-alone piece of equipment. A consumer purchases the VCR and owns it outright. The consumer can then pick the VCR up, transport it, connect it to someone else's television and, assuming both devices are in working order, record programming. The RS-DVR does not have that stand-alone quality. An RS-DVR customer would not be able to disconnect his or her home set-top box, connect it elsewhere, and record programming. This is because the RS-DVR is not a single piece of equipment; it consists of a multitude of devices and processes. Unlike a VCR, the simple push of a button by the RS-DVR customer does not produce a recording. The pushing of the "record" button on the remote control merely sends a request to

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in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
17 U.S.C. § 107.

Cablevision's head-end to set the recording process in motion. The various computers and devices owned and operated by Cablevision and located at its head-end are needed to produce a recording.

Indeed, ownership of the RS-DVR set-top box remains with Cablevision and the RS-DVR requires a continuing relationship between Cablevision and its customers. In *Sony,* "[t]he only contact between Sony and the users of the Betamax ... occurred at the moment of the sale." 464 U.S. at 438. In stark contrast, Cablevision would not only supply a set-top box for the customer's home, but it would also decide which programming channels to make available for recording and provide that content, and it would house, operate, and maintain the rest of the equipment that makes the RS-DVR's recording process possible. Cablevision has physical control of the equipment at its head-end, and its personnel must monitor the programming streams at the head-end and ensure that the servers are working properly. (Tr. 52-54, 75-76). Cablevision determines how much memory to allot to each customer and reserves storage capacity for each on a hard drive at its facility, and customers may very well be offered the option of acquiring additional capacity for a fee. On the other hand, once Sony sells a VCR to a customer, Sony need not do anything further for the VCR to record.

The ongoing participation by Cablevision in the recording process also sets the RS-DVR apart from the STS-DVR. Cablevision claims that with both, the

customer is "doing" the copying, and it points to the fact that no programmer ... has ever sued Cablevision or any other cable operator in connection with its providing set-top storage DVRs to its customers (Defs. Mem. at 16). By extension, the RS-DVR, it argues, presents no copyright infringement.

This argument is unavailing. The fact that plaintiffs and other programming owners have not sued cable operators over the legality of STS-DVRs does not insulate the RS-DVR from such a challenge. Cablevision has not asserted any affirmative defenses to that effect, nor have plaintiffs conceded the legality of STS-DVRs. In any event, Cablevision's attempt to analogize the RS-DVR to the STS-DVR fails. The RS-DVR may have the look and feel of an STS-DVR (*see* Defs. Ex. 101), but "under the hood" the two types of DVRs are vastly different. For example, to effectuate the RS-DVR, Cablevision must reconfigure the linear channel programming signals received at its head-end by splitting the APS into a second stream, reformatting it through clamping, and routing it to the Arroyo servers. The STS-DVR does not require these activities. The STS-DVR can record directly to the hard drive located within the set-top box itself; it does not need the complex computer network and constant monitoring by Cablevision personnel necessary for the RS-DVR to record and store programming.

The RS-DVR, contrary to defendants' suggestions, is more akin to VOD than to a VCR, STS-DVR, or other time-shifting device. In fact, the RS-DVR is based on

a modified VOD platform. (Hartson Report ¶ 114; Tr. 82). With both systems, Cablevision decides what content to make available to customers for on-demand viewing. The programming available for viewing is stored outside the customer's home at Cablevision's head-end. Both utilize a "session resource manager," such as the eSRM used by the RS-DVR, to set up a temporary pathway to deliver programming in encrypted form to the customer for playback; decryption information is transmitted in both systems to the customer's set-top box. (Hartson Report ¶ 120). The number of available pathways for programming delivery in both systems is limited; if there are none available, the customer gets an error message or busy signal. (*Id.*). Thus, in its architecture and delivery method, the RS-DVR bears striking resemblance to VOD-a service that Cablevision provides pursuant to licenses negotiated with programming owners. (*See* Tr. 84-85).

Defendants cite a host of cases to buttress their argument that the RS-DVR is not a service like VOD, but a machine that allows customers to engage in copying. None of these cases is helpful to defendants. For example, defendants cite two cases for the proposition that a company that makes photocopiers available to the public on its premises is not subject to liability for direct infringement unless the company's employees do the copying themselves. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996). In both cases college professors provided

copyrighted material to a copy center, which assembled the material into "coursepacks" and sold them to students without paying royalties or obtaining permission from the copyright holders, and in both cases the copy center was found directly liable for infringement.

Here, Cablevision would have a similarly active role. Cablevision, through its RS-DVR, would not merely house copying machinery on its premises for customers to engage in copying. Rather, Cablevision would be "doing" the copying, notwithstanding that the copying would be done at the customer's behest, and Cablevision would provide the content being copied. These cases and others cited by defendants are thus inapposite. *See also RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y. 1984) (holding retail copy service that operated cassette copying machine used to copy copyrighted sound recordings liable for direct infringement, even though copies were made at request of customers).

Cablevision also relies, to no avail, on *Religious Techn. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and subsequent cases brought against Internet service providers ("ISPs") for copyright infringement committed by their customers. In *Netcom*, an individual posted copyrighted material in a message on a computer bulletin board service ("BBS"). By operation of the ISP's software, the posting to the BBS automatically resulted in the copying of the message to the ISP's computers, where the copies were stored briefly. The

court declined to find the ISP liable for direct infringement based on these copies, concluding that it is virtually impossible for an ISP to filter out infringing data. This conclusion was premised on the unique attributes of the Internet, for "the court [did] not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network." *Id.* at 1372.

Cablevision, however, is not similarly situated to an ISP. Cablevision is not confronted with the free flow of information that takes place on the Internet, which makes it difficult for ISPs to control the content they carry. Cablevision has unfettered discretion in selecting the programming that it would make available for recording through the RS-DVR and is the driving force behind the RS-DVR's recording and playback functions. Indeed, at one point Cablevision considered limiting the RS-DVR to just twelve or fifty channels before deciding on including all 170 channels. This situation is a far cry from the ISP's role as a passive conduit in *Netcom*. Furthermore, the copies made to the ISP's computers in *Netcom* were incidental to the ISP's providing Internet access. The copies that would be made through the RS-DVR, in contrast, are instrumental to the RS-DVR's operation. Defendants' reliance on *Netcom* and its progeny is therefore misplaced.

On the record before the Court, a reasonable factfinder could only conclude that the copying at issue-the copying of programming to the RS-DVR's Arroyo servers-would be done not by the customer but by Cablevision, albeit at the customer's request. This copying would, as a matter of law, constitute copyright infringement.

ii. ***Buffer "Copies"***

Defendants deny that the portions of programming temporarily stored in buffer memory during the RS-DVR's operation are "copies" for purposes of the Copyright Act. Under the Copyright Act, "copies" are defined as:

> [M]aterial objects ... in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies"includes the material object ... in which the work is first fixed.

17 U.S.C. § 101.

The buffer copies here, defendants contend, cannot be considered infringing copies because they are "not fixed" and are "otherwise de minimis." (Defs. Mem. at 29). The Copyright Act, however, provides that a work is "fixed" if it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than

transitory duration." *Id.* Here, as discussed, the portions of programming residing in buffer memory are used to make permanent copies of entire programs on the Arroyo servers. Clearly, the buffer copies are capable of being reproduced. Furthermore, the buffer copies, in the aggregate, comprise the whole of plaintiffs' programming. For instance, while it is true that only three frames of each program carried on the linear channels are resident in the primary ingest buffer at any given time, ultimately, however, the entire programming content for each channel will pass through the primary ingest buffer. The aggregate effect of the buffering that takes place in the operation of the RS-DVR can hardly be called de minimis.

Furthermore, numerous courts have held that the transmission of information through a computer's random access memory or RAM, as is the case with the buffering here, creates a "copy" for purposes of the Copyright Act. *See, e.g., Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998) (loading of software into RAM is "copying"); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (same); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (same); *Marobie-FL., Inc. v. Nat'l Ass'n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997) (downloading of file from website constitutes "copying" by host computer, where portions of file pass through RAM before being immediately transmitted over Internet).

Indeed, the United States Copyright Office, in its August 2001 report on the Digital Millennium Copyright Act[8] ("DMCA Report"),[9] has indicated that buffer copies are "copies" within the meaning of the Copyright Act. Specifically, the Copyright Office concluded that temporary copies of a work in RAM are generally "fixed" and thus constitute "copies" within the scope of the copyright owner's right of reproduction, so long as they exist for a sufficient amount of time to be capable of being copied, perceived or communicated. (DMCA Report at xxii, 110-11).

Because I conclude that Cablevision, through operation of its proposed RS-DVR, would "copy" plaintiffs' programming both in the Arroyo servers and in buffer memory, in violation of plaintiffs' exclusive right of reproduction under the Copyright Act, summary judgment is granted in favor of plaintiffs in this respect. Cablevision is hereby enjoined from so copying plaintiffs' copyrighted works, unless it obtains a license to do so.

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[8] The DMCA was enacted into law in October 1998 to bring copyright law in line with the digital age. *See* S. Rep. No. 105-190, at 1-2 (1998).

[9] *See* U.S. Copyright Office, *DMCA Section 104 Report*, at 107-17 (Aug.2001), *available at* http:// www. copyright. gov/ reports/ studies/ dmca/ dmca_ study. html.

2. *Is Cablevision Making Unauthorized Transmissions?*

As discussed, for the RS-DVR to work, the programming stream that Cablevision receives at its head-end must be split into a second stream, reformatted, and routed to the Arroyo server system. When a customer requests playback of a recorded program, the program must be retrieved from the Arroyo server and transmitted to the customer. This transmission, plaintiffs contend, is an unauthorized public performance by Cablevision of their copyrighted works.

To "perform" a work, as defined in the Copyright Act, is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. Cablevision does not contest that the streaming of recorded programming in response to a customer's request is a performance. It again suggests, however, that it is passive in this process-that it is the customer, not Cablevision, that is "doing" the performing. I reject this suggestion, for the same reasons that I reject the argument that the customer is "doing" the copying involved in the RS-DVR. Cablevision actively participates in the playback process. The customer's use of the remote control to select a recorded program for viewing does not, in itself, result in playback. *Compare with Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d

154, 159 (3d Cir. 1984) (one who actually places a video cassette in the video cassette player and operates the controls "performs" because that activity results in the sequential showing of the movie's images accompanied by sound). The customer's command triggers the playback process, but again, it is Cablevision and its operation of an array of computer servers at the head-end that actually make the retrieval and streaming of the program possible.

Cablevision next posits that, even if it is "doing" the performing, such performance is fundamentally private, for each streaming emanates from a distinct copy of a program uniquely associated with one customer's set-top box and intended for that customer's exclusive viewing in his or her home. This argument, too, is flawed.

The Copyright Act provides, in relevant part, that to "perform" a work "publicly" is:

> [T]o transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (emphasis added). This part of the definition of public performance is known as the "transmit clause." Under the plain language of this

clause, a transmission "to the public" is a public performance, even if members of the public receive the transmission at separate places at different times. Such is the case here. Cablevision would transmit the same program to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback.

Furthermore, where the relationship between the party sending a transmission and party receiving it is commercial, as would be the relationship between Cablevision and potential RS-DVR customers, courts have determined that the transmission is one made "to the public." *See On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991).

On Command is instructive. There, the plaintiff developed a system for the electronic delivery of movie videos to hotel guest rooms. The system's computer equipment and bank of video cassette players ("VCPs") were centrally housed, and the VCPs were wired to the guest rooms. The hotel guest, using a remote control and an on-screen menu from her room, could at any time select a movie, which could only be seen in that room. Defendants, who owned the copyrights in the movies shown through the system, claimed that the system's video transmissions were public performances. The court agreed, holding that because the relationship between the transmitter of the performance and the audience was commercial, the performance was "to

the public," even though hotel guests were watching the videos in a decidedly non-public place. In so holding, the court cited the language of the Copyright Act providing that a performance may still be public even though it reaches members of the public at different times and places. *Id.* at 790 (citing 17 U.S.C. § 101). It further pointed to the legislative history:

> [A] performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place.... The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms ....; they are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.

Id. (citing H.R. Rep. No. 90-83, at 29 (1967)). Accordingly, the court concluded "whether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public." *Id.*

Similarly, in *Redd Horne,* the Third Circuit stated:

> [T]he transmission of a performance to members of the public, even in private settings such as hotel rooms or [private viewing rooms open to the public], constitutes a public performance. As the statutory language and legislative history [of the Copyright Act] clearly indicate, the fact that members of the public view the performance at different times does not alter this legal consequence.

749 F.2d at 159. There, the defendants operated video sale and rental stores, where they set up private viewing booths so that customers could watch copyrighted movie video tapes.

In both *Redd Horne* and *On Command,* the party providing the video service had discretion over what content was available to customers; the customer selected the programming he or she wished to view; the service provider supplied the content from one location to another location for the customer's exclusive viewing; and the service provider supplied the same content to other customers at different times. Cablevision is no different from the *On Command* and *Redd Horne* service providers, and its streaming of a program recorded with the RS-DVR back to the requesting customer is no less a public performance than the transmissions in those cases.

I hold, as a matter of law, that Cablevision would engage in public performance of plaintiffs'

copyrighted works in operating its proposed RS-DVR service, thereby infringing plaintiffs' exclusive rights under the Copyright Act. Summary judgment is granted in favor of plaintiffs in this respect as well. Absent the appropriate licenses, Cablevision is hereby enjoined from engaging in such public performance.

CONCLUSION

For the reasons set forth above, plaintiffs' motions for summary judgment are granted, and defendants' motion for summary judgment is denied. Defendants' counterclaim is dismissed with prejudice. Cablevision is permanently enjoined, in connection with its proposed RS-DVR system, from (1) copying plaintiffs' copyrighted works and (2) engaging in public performance of plaintiffs' copyrighted works, unless it obtains licenses to do so. Plaintiffs shall submit a proposed judgment, on notice, within seven business days hereof. Costs will be awarded.

SO ORDERED.

Appendix C

Constitutional and Statutory Provisions Involved

U.S. Const. art. I § 8, cl. 8

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

17 U.S.C. § 101

§ 101. Definitions

* * * *

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

* * * *

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

* * * *

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

* * * *

To perform or display a work "publicly" means--

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

* * * *

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

* * * *

17 U.S.C. § 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 111

§ 111. Limitations on exclusive rights: Secondary transmissions

* * * *

(c) Secondary Transmissions by Cable Systems.--

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection and section 114(d), secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental

authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of

such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: Provided, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: And provided further, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States--Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable

system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

* * * *

(f) Definitions.--As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further

transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

* * * *

17 U.S.C. § 114

§ 114. Scope of exclusive rights in sound recordings

* * * *

(d) Limitations on exclusive right.--Notwithstanding the provisions of section 106(6)--

* * * *

(3) Licenses for transmissions by interactive services.--

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: Provided, however, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if--

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: Provided, however, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: Provided, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if--

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph--

(i) a "licensor" shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

* * * *

(j) Definitions.--As used in this section, the following terms have the following meanings:

* * * *

(7) An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

* * * *

17 U.S.C. § 501

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section

106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

* * * *

17 U.S.C. § 512

§ 512. Limitations on liability relating to material online

(a) Transitory digital network communications.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System caching.--

(1) Limitation on liability.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or

other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions.--The conditions referred to in paragraph (1) are that--

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the

material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology--

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if--

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information residing on systems or networks at direction of users.--

(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.--

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be

removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or

circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), esponds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

* * * *

(i) Conditions for eligibility.--

(1) Accommodation of technology.--The limitations on liability established by this section shall apply to a service provider only if the service provider--

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.--As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and--

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

* * * *

114, (10)

No. 08-448

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *ET AL.*,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a challenge to Cablevision's proposed Remote Storage Digital Video Recorder ("RS-DVR"), which consumers would use to record and play back television programs, just as they currently do with a VCR or conventional DVR. As with a VCR or DVR, each consumer makes a separate recording, and each recording can be viewed only by the consumer who made it. The principal difference is that, with the RS-DVR, the recordings are stored in a remote location. The questions presented are:

1. Whether Cablevision would directly infringe petitioners' reproduction rights when consumers decided what programs to record and used the RS-DVR to record them.

2. Whether Cablevision would directly infringe petitioners' reproduction rights because the RS-DVR—like all digital devices—momentarily stores and then overwrites tiny snippets of program data in transient data buffers.

3. Whether Cablevision would directly infringe petitioners' public performance rights when consumers used the RS-DVR to play back their own separate recordings to themselves.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

1. Cablevision Systems Corporation has no parent corporation. The following publicly held corporations own 10% or more of Cablevision Systems Corporation's stock: (1) Legg Mason, Inc. (through ClearBridge Advisors, LLC, and Smith Barney Fund Management LLC, as a group); and (2) T. Rowe Price Group, Inc.

2. CSC Holdings, Inc. is a wholly owned subsidiary of Cablevision Systems Corporation and is not publicly traded.

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BRIEF IN OPPOSITION

INTRODUCTION

For decades, consumers have lawfully used various technologies—from the Betamax, to VHS VCRs, to digital video recorders ("DVRs")—to record television programs for later viewing. This case involves a challenge to Cablevision's proposed "Remote-Storage" DVR ("RS-DVR"), which consumers would use for the same lawful purpose. The principal difference is that, when a consumer records a program using the RS-DVR, the recording is stored in a remote location. Presumably recognizing that the lawfulness of the consumer conduct here forecloses any contributory infringement claim, pe-

titioners alleged only that Cablevision, by offering that new technology, would itself *directly* infringe their copyrights. The Second Circuit correctly rejected that claim.

The petition fails to identify any colorable conflict with another decision. And while petitioners claim that the Second Circuit's decision will disrupt the marketplace, they identify no existing technology that will improperly escape liability based on the court's ruling, resorting instead to hypothetical technologies that should be left for future courts to address if they arise. Petitioners, moreover, nowhere explain why the robust doctrine of contributory infringement is inadequate to address their hypotheticals and, more generally, the intentional facilitation of unlawful copying they purport to fear. In the unlikely event that the full range of infringement doctrines proves insufficient, there will be time enough for this Court to intervene. But there is no reason to grant review in a narrow case involving only direct-infringement claims and *lawful* consumer copying.

STATEMENT

I. BACKGROUND

A. Statutory Framework

The Copyright Act grants authors exclusive rights "to do" six specified things with their works, including "to reproduce the copyrighted work in copies" and "to perform the copyrighted work publicly." 17 U.S.C. § 106(1), (4). Absent an exception such as fair use, anyone who exercises one of the author's exclusive rights without permission infringes the author's copyright. See *id.* § 501(a).

Courts have also long invoked doctrines such as contributory infringement to "impos[e] * * * liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). Contributory infringement occurs when

someone "intentionally induc[es] or encourag[es] direct infringement" by another. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Providing the "means" to permit another person to infringe—such as the equipment he uses to make copies—is a classic example. See 3 *Nimmer on Copyright* § 12.04[A][3][b], at 12-86.1 to -105 (2008) ("Nimmer"); 2 *Goldstein on Copyright* § 8.1.2, at 8:14-18 (3d ed. 2008) ("Goldstein"). Because contributory infringement requires underlying direct infringement by someone else, a defendant cannot be liable for contributing to *lawful* copying. See Pet. 21 (citing *Sony*, 464 U.S. at 434).

B. Consumer Time-Shifting

Since Sony introduced the Betamax VCR in 1976, consumer "time-shifting"—recording television programs for later viewing—has been a fixture of the American entertainment landscape. In *Sony*, this Court held that consumer time-shifting is non-infringing fair use, observing that it merely enables a viewer to watch at a later time a program he was already "invited to witness in its entirety." 464 U.S. at 447-455. Because consumer time-shifting is lawful, Sony could not be liable for contributory infringement. See *id.* at 434-456. There are now about 100 million VCRs in U.S. homes. C.A. App. 828.

The VCR's technological successor, the DVR, was introduced in the 1990s. Pet. App. 50a. While VCRs record programs onto magnetic tape, DVRs record them digitally on a hard drive. *Ibid.* Many cable companies offer "set-top DVRs" that combine the functions of a cable set-top box and a DVR. *Ibid.* Cable and satellite companies now provide more than 27 million set-top DVRs to American homes. See Pasztor, *Study Projects Greater Reliance of Cable-TV Subscribers on DVRs*, Wall St. J. Online, July 16, 2007.

Cable companies typically charge an additional monthly subscription fee for use of the DVR, while retaining ownership and all maintenance and repair responsibilities. C.A. App. 1173-74; C.A. Confid'l App. 195. Subscribers are prohibited from opening set-top DVRs to access their contents, and security measures are used to prevent unauthorized access or use. C.A. App. 959, 1173; C.A. Confid'l App. 1037.

II. THIS LITIGATION

A. The RS-DVR

Respondents Cablevision Systems Corporation and CSC Holdings, Inc. ("Cablevision") provide cable television service primarily in the New York area, carrying approximately 170 channels under licenses with programmers. See Pet. App. 46a, 53a. For years, Cablevision has offered set-top DVRs to its subscribers. *Id.* at 51a. Set-top DVRs, however, have shortcomings. For example, Cablevision must install an individual unit with an expensive hard drive in each home, and repairs require disruptive house calls. See C.A. App. 768.

Cablevision therefore developed the RS-DVR. The primary difference between the RS-DVR and a traditional DVR is where the recordings are stored. With a set-top DVR, recordings are stored on a hard drive in the set-top box. Pet. App. 50a. With the RS-DVR, each customer's recordings are stored on hard drives in a central location. *Id.* at 51a-52a.

"To the customer, * * * the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR." Pet. App. 6a. With both systems, the customer can record a program by pressing "record" when watching television or by scheduling the recording in advance from an on-screen guide. See *ibid.* With both systems, the customer can then play back his recording by selecting it from an on-screen list. See *ibid.* The remote

controls and on-screen interfaces subscribers use to operate Cablevision's RS-DVR and set-top DVRs are identical. See *id.* at 51a.

Like a VCR or set-top DVR, the RS-DVR responds "automatically" to consumer commands, "with no human intervention or decision-making" by any Cablevision employee. C.A. App. 116, 119, 121.[1] Like those other devices, moreover, the RS-DVR records only programs the customer chooses to record, and makes recordings only from the real-time television programming stream. See Pet. App. 4a-5a, 59a. Consequently, the customer can record only programs he could have watched on television, and the recordings can be made only as the programs are telecast. See *id.* at 4a-6a.

When customers record programs with VCRs or set-top DVRs, each customer ends up with a separate copy. The same is true with the RS-DVR: If 1,000 people record an episode of "The Wire," 1,000 separate recordings are made. Pet. App. 58a. A customer cannot play back anything but the programs he recorded, and no other customer can access his recordings. *Id.* at 6a, 59a-60a.

Finally, both set-top DVRs and the RS-DVR use transient data buffers that momentarily store and process tiny snippets of program data as it travels through the system. See Pet. App. 5a; C.A. App. 1169-1171. That data is constantly overwritten as new data flows in. Pet. App. 5a. Buffering is not unique to DVRs: "All digital devices * * * utilize transient data buffers." *Id.* at 54a.

---

[1] Petitioners' assertion that "Cablevision employees must staff the 'RS-DVR' system around the clock to operate and maintain it" (Pet. 11) is inaccurate. Cablevision's facility is staffed at all times, but the employees do not "operate" the RS-DVR—they are there to fix it if it breaks. See C.A. App. 1205-1206; C.A. Confid'l App. 732-734, 750.

B. Proceedings in District Court

Petitioners own copyrights in programs appearing on Cablevision's cable system. Pet. App. 45a-46a. In 2006, they brought this action to enjoin Cablevision from offering the RS-DVR. *Id.* at 60a. They claimed that Cablevision would infringe their exclusive right to reproduce their works in two respects—first, when customers used the RS-DVR to record programs; and second, when the RS-DVR momentarily buffered data. *Id.* at 63a-64a. They further alleged that Cablevision would infringe their right to perform their works publicly when customers played back their recordings. *Id.* at 75a. Early in the litigation, petitioners stipulated that they were claiming only *direct* infringement, thus waiving any theory that Cablevision was *indirectly* liable for consumer copying. See *id.* at 61a. Cablevision agreed that it would not assert any fair-use defense to those direct-infringement claims. *Ibid.*

The district court granted summary judgment to petitioners. Because petitioners claimed only direct infringement, the parties "agree[d]" that, with respect to recording, the dispositive question is "*who* makes the copies," Cablevision or its customers. Pet. App. 64a-65a. The court concluded that Cablevision made the copies and thus would infringe petitioners' reproduction rights. *Id.* at 72a. The court also held that Cablevision would infringe petitioners' reproduction rights when program data passed through the buffers, *id.* at 72a-74a, and would infringe petitioners' public performance rights when customers played back their recordings, *id.* at 75a-80a.

C. The Second Circuit's Decision

The Second Circuit (*Walker*, Sack, and Livingston, JJ.) unanimously reversed. Pet. App. 1a-42a.

1. The Second Circuit rejected petitioners' claim that Cablevision would directly infringe when customers used

the RS-DVR to record programs. The court of appeals agreed that, because petitioners asserted only direct infringement, the critical question was "*who* made th[e] copy." Pet. App. 19a. "If it is Cablevision, plaintiffs' theory of direct infringement succeeds; if it is the customer, plaintiffs' theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs." *Ibid.*

To resolve that question, the court endorsed a standard first articulated in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), and followed in cases such as *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). Pet. App. 19a-23a. That standard focuses on the "volitional conduct that causes the copy to be made." *Id.* at 20a. The court concluded that the customer rather than Cablevision supplied that volitional conduct here by "ordering [the RS-DVR] to produce a copy of a specific program." *Id.* at 20a-21a.

"In the case of a VCR," the court observed, "it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or * * * owns the machine." Pet. App. 20a-21a. An RS-DVR user is not "sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party." *Id.* at 21a. The court also relied on an analogy to a copy-shop that provides self-service photocopiers that customers can operate themselves to make copies. See *id.* at 22a. The only person who "does" the copying with such a machine, the court recognized, is the customer, not the proprietor who makes the machine available for customer use. See *ibid.*

The court declined to decide whether, in other circumstances, "one's contribution to the creation of an infring-

ing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." Pet. App. 26a. It held only that, "on the facts of this case, copies produced by the RS-DVR system are 'made' by the RS-DVR customer." *Id.* at 26a-27a. The court emphasized that its holding would not immunize defendants who facilitated *unlawful* copying because "the doctrine of contributory liability stands ready to provide adequate protection." *Id.* at 24a.

2. The Second Circuit also rejected petitioners' claim that the RS-DVR's momentary data buffering would infringe their reproduction right. As the court explained (Pet. App. 10a-11a), that right is not infringed unless the defendant produces "copies"—material objects in which a work is "fixed." 17 U.S.C. §§ 101, 106(1). "A work is 'fixed' * * * when its embodiment in a copy * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*" *Id.* § 101 (emphasis added). Stressing that its inquiry was "necessarily fact-specific," the court held that the RS-DVR's buffer data does not meet that "more than transitory duration" requirement. Pet. App. 17a-18a. "No bit of data," the court noted, "remains in any buffer for more than a fleeting 1.2 seconds." *Id.* at 17a. And "each bit of data here is rapidly and automatically overwritten." *Ibid.*

3. Finally, the court held that allowing customers to use the RS-DVR to play back their own recordings would not infringe petitioners' public performance right. The relevant definition required petitioners to show that Cablevision would "transmit * * * a performance * * * of the work * * * *to the public*." 17 U.S.C. § 101 (emphasis added). The crucial inquiry was therefore "who precisely is 'capable of receiving' a particular transmission of a performance." Pet. App. 30a. "[B]ecause the RS-DVR sys-

tem, as designed, only makes transmissions to one subscriber using a copy made by that subscriber," the court held, "the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." *Id.* at 36a. The court accordingly held that allowing a customer who recorded a program—and *only* that customer—to play back his *own* recording was not a "public" performance. See *id.* at 39a.

REASONS FOR DENYING THE PETITION

The Second Circuit decided three focused issues of direct infringement under the Copyright Act. With respect to each one, the court followed the plain meaning of the statute and applied it correctly to the narrow circumstances of Cablevision's system—a remote-storage version of the VCRs and DVRs that consumers have used for decades. Those rulings do not conflict with any decision of this Court or any other court of appeals. This case is thus entirely unlike the cases—*Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005), and *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)—that petitioners invoke to justify review. Pet. 15-16. Those cases raised issues that squarely divided the circuits. See Pet. in No. 04-480, at 24-29 (*Grokster*); *Acuff-Rose Music, Inc.* v. *Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting).

Lacking a serious claim of conflict, petitioners and their *amici* vociferously proclaim that the case is important because it will lead to rampant illegal copying. But those predictions have no foundation. Petitioners ignore the robust doctrine of contributory infringement, which is designed to address precisely the situations petitioners purport to fear—the provision of systems that promote and facilitate *illegal* copying. Petitioners did not claim contributory infringement here, but they cannot pretend

the doctrine does not exist. Moreover, the Second Circuit's direct-infringement rulings were limited and do not prejudge any of petitioners' hypothetical technologies.

The RS-DVR does not allow consumers to do anything they cannot already lawfully do with other devices. Since *Sony Corporation of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), consumers have had a fair-use right to record television programs for later viewing. Petitioners' description of the RS-DVR as a "service that automatically copies [their] copyrighted television programming and then transmits those programs to subscribers on request" (Pet. 1) is misleading. Like VCRs and standard DVRs, the RS-DVR does not record any programs on its own. Rather, *consumers* use the RS-DVR to record programs as they air, using the same handheld remote control and on-screen interface used to operate a traditional DVR. And each recording is available for playback *only* to the customer who made it.

Petitioners also misread the Second Circuit's decision when they urge that it misapplied *Sony*. The court did not base its decision on *Sony*. It relied on the well-established standards for direct infringement that other courts have applied for over a decade, with none of the adverse consequences petitioners hypothesize. *Sony* is relevant only because it explains why petitioners did not (and could not) accuse Cablevision of *contributory* infringement: The underlying consumer copying here is lawful under *Sony*. If some future technology enables *illegal* copying, lower courts—and if necessary this Court—can address the matter in a case raising all available copyright liability theories. There is no reason to grant review based on hypothetical concerns in a case where the boundaries of contributory infringement were not tested and the underlying consumer conduct is perfectly lawful.

I. THE SECOND CIRCUIT'S RECORDING RULING DOES NOT WARRANT REVIEW

A. The Second Circuit Applied Settled Principles

1. The Copyright Act grants authors the exclusive right "to do" certain things, including "reproduc[ing] the copyrighted work in copies." 17 U.S.C. § 106 & 106(1). A person who "does" one of those things without permission or exemption is a direct infringer. See *id.* § 501(a); 7 *Patry on Copyright* § 25:87, at 25-240 (2008) ("Patry"). Because petitioners claimed only *direct* infringement—eschewing any claim that Cablevision contributed to illegal copying by consumers—the parties "agree[d]" that the dispositive question is "*who* makes the copies." Pet. App. 8a, 64a.

The petition's central claim is that, in answering that question, the Second Circuit erroneously "treated this case as though *Sony* supplied the controlling rule." Pet. 15; see *id.* at 18-20 (accusing the court of "[m]isreading *Sony*" and erroneously "[m]apping this case onto *Sony*"). But the court did not treat *Sony* as resolving "who" does the copying; it barely mentioned *Sony*. Instead, the court applied the text of the statute, common sense, and the legal standard followed by every court and leading treatise to have considered the issue.

The Second Circuit explained that, with a VCR, "the person who actually presses the button to make the recording" makes the copy, "not the person who manufactures, maintains, or * * * owns the machine." Pet. App. 20a-21a. Likewise, with a self-service photocopier, the customer who presses the button to operate the machine is the one who "makes" the copies—not the proprietor who owns, houses, and maintains the device. See *id.* at 22a. The RS-DVR is no different: When a subscriber uses the RS-DVR to record a program, it is the sub-

scriber who—by selecting the program and pressing the record button—"makes" the copies. See *id.* at 20a-23a.

In reaching that conclusion, the Second Circuit followed the standard—first articulated in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)—that courts across the country have consistently applied in fixing the "line between direct and contributory liability." Pet. App. 19a. That standard focuses on who engages in "volitional conduct" in making a copy. *Id.* at 20a. In *Netcom*, for example, the court rejected a direct infringement claim against an Internet service provider whose servers made copies in response to customer commands, "without any human intervention" by Netcom. 907 F. Supp. at 1368-1369. Direct infringement, the court held, requires an "element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." *Id.* at 1370. Although Netcom "design[ed]," "install[ed]," "maintain[ed]," and "operat[ed]" the servers, it "did not take any affirmative action that directly resulted in copying plaintiffs' works." *Id.* at 1368-1370.

The Fourth Circuit embraced that standard in *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). *Netcom*, the court held, "made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct—specifically, the act constituting infringement—to become a direct infringer." *Id.* at 551. Direct infringement requires that the defendant "himself [have] trespassed on the exclusive domain of the copyright owner." *Id.* at 550. The volition standard has also been endorsed by the Third Circuit, see *Parker* v. *Google, Inc.*, 242 F. App'x 833, 836-837 (3d Cir.

2007) (unpublished), myriad district courts,[2] and the leading treatises, see 3 Nimmer § 12B.01[A][1], at 12B-9 to -11; 2 Goldstein § 8.0, at 8:5-6.

The Second Circuit applied that same standard here. "*Netcom* and its progeny," the court observed, focus on who engages in "volitional conduct" in making a copy. Pet. App. 20a. Here, the customer, not Cablevision, supplies that volition: When a customer chooses a program and presses "record," the RS-DVR responds "automatically," "with no human intervention or decision-making" by any Cablevision employee—just like a VCR or photocopier does. C.A. App. 116, 119. Thus, the customer, not Cablevision, "does" the copying. See Pet. App. 18a-24a.

Even a quick glance at the Second Circuit's opinion makes clear that it rests on that well-established volition standard—not *Sony*. The only place the court even mentioned *Sony* was in a two-paragraph postscript *after* its conclusion that "the district court erred." Pet. App. 24a-26a.[3] And even there, it merely used *Sony* to illustrate that many of the factors petitioners invoke seem more relevant to contributory infringement. See *ibid.* Because the decision below did not turn on *Sony*, petitioners' complaint that the court "treated this case as though

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[2] See, *e.g.*, *Field* v. *Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006); *Newborn* v. *Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 n.3 (D.D.C. 2005); *Perfect 10, Inc.* v. *Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1167-1169 (C.D. Cal. 2002); *Marobie-FL, Inc.* v. *Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997); *Playboy Enters., Inc.* v. *Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512-513 (N.D. Ohio 1997); *Sega Enters. Ltd.* v. *MAPHIA*, 948 F. Supp. 923, 931-932 (N.D. Cal. 1996).

[3] Contrary to petitioners' claim (Pet. 19), the Second Circuit's analysis of who exercises volition when using a VCR (Pet. App. 20a-21a) is not a reference to *Sony*. The court was merely making the commonsense observation that, when a customer uses a VCR, the customer and not the VCR provider is "doing" the copying.

Sony supplied the controlling rule" (Pet. 15) is incorrect and provides no basis for review.

2. Petitioners' factbound challenges to the Second Circuit's application of those settled principles likewise do not warrant review. Petitioners urge that Cablevision "designed," "operates," and "maintains exclusive physical control" over the RS-DVR. Pet. 25. But that is precisely what courts have held insufficient to establish direct infringement. Netcom "design[ed]," "operate[d]," and "maintain[ed]" the system, but it was not a direct infringer. *Netcom*, 907 F. Supp. at 1368-1370. "'[V]olitional conduct' in designing and operating [a] service under the direction of * * * human management" (Pet. 25) is not volition *in making a copy*. If it were, every business that provides self-service photocopiers, set-top DVRs, or Internet service would be a direct infringer.

Nor does it matter that Cablevision operates the cable system that provides the licensed real-time television programming that its customers may choose to record. Pet. 27-28. "[F]urnish[ing] a copyrighted work to another, who in turn wrongfully copies from such work," is a classic example of "*contributory* infringe[ment]." 3 Nimmer § 12.04[A][3][b], at 12-86.1 (emphasis added); see also 2 Goldstein § 8.0, at 8:3. But it does not make the content-provider the one who "does" the copying. Libraries, for example, offer both books and photocopiers to their patrons. But no one would say the library "does" the copying when a patron uses the library's photocopier to duplicate pages from a library book. See 3 Nimmer § 12.04[A][3][b], at 12-88. Likewise, cable and satellite companies provide both television programs and set-top DVRs to 27 million subscribers. But those companies do not "do" the copying when subscribers record programs.

Besides, petitioners exaggerate Cablevision's role in providing content. Pet. 27. Cablevision selects channels to carry on its cable system, but it has "no control over

what programs are made available on individual channels or when those programs will air, if at all." Pet. App. 23a. And Cablevision makes those same channels available to subscribers who use VCRs, DVRs, or no recording devices at all. See *id.* at 23a, 53a. Cablevision's channel-selection decisions are thus far removed from any customer's decision to record a particular work.

3. Petitioners assert that the Second Circuit's test is inconsistent with the statutory text granting authors the exclusive right "to do and to authorize" various acts. Pet. 24-25. But petitioners never explain why the volition standard does not accurately reflect what it means "to do" the copying, as required for direct infringement. See p. 11, *supra*.[4] To the extent petitioners rely on the "to authorize" element—implying that Cablevision infringes by "authorizing" its customers to copy—their claim was neither pressed nor passed upon in the court of appeals, and for good reason: The "authorize" clause codifies doctrines of *secondary* liability, not direct infringement. See H.R. Rep. No. 94-1476, at 61 (1976); 2 Goldstein § 8.0, at 8:1-2; 3 Nimmer § 12.04[A], at 12-71 to -72; *Venegas-Hernandez* v. *ACEMLA*, 424 F.3d 50, 57-58 (1st Cir. 2005); *Subafilms, Ltd.* v. *MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1090-1095 (9th Cir. 1994) (en banc). Those are precisely the claims that petitioners waived by agreeing to allege only direct infringement. Pet. App. 61a.

Nor is there merit to petitioners' claim that Cablevision must be a direct infringer because it falls outside the

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[4] The volition standard is consistent with the principle that multiple defendants can directly infringe. Cf. Pet. 19 n.4. It simply requires that each defendant exercise volition in making the copy. The standard is also consistent with direct infringement's strict-liability status. Strict liability eliminates fault, not volition, as an element of liability. See *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring).

safe harbor of the Online Copyright Infringement Liability Limitation Act. Pet. 26. *CoStar* rejected that same argument, quoting the Act's express disclaimer: "'The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing * * * .'" 373 F.3d at 552-555 (quoting 17 U.S.C. § 512(*l*)); see also 3 Nimmer § 12B.06[B][1], at 12B-79; 6 Patry § 21:85, at 21-176. Congress included that language for the *precise purpose* of making clear that failure to qualify for the safe harbor does not preclude a non-infringement finding under cases such as *Netcom*. See S. Rep. No. 105-190, at 19 & n.20 (1998).

Far from being a "'special liability-limiting rule for Internet servers,'" the volition standard reflects the Act's fundamental distinction between those who "do" the copying and those who *contribute* to copying by others. See *CoStar*, 373 F.3d at 548-552. And while petitioners criticize lower courts for "treating *Netcom* as if it were a decision of this Court" (Pet. 28), *Netcom* merely applied the statutory standard. General agreement with its persuasive legal analysis is not grounds for review.

B. There Is No Conflict

1. Petitioners pair their assertion that the Second Circuit erroneously "mapped" this case onto *Sony* with the assertion that the Second Circuit ignored—and created a conflict with—*New York Times Co.* v. *Tasini*, 533 U.S. 483 (2001). Pet. 18-23. But *Tasini* involved an unrelated issue—"the rights of freelance authors and a presumptive privilege of their publishers" under 17 U.S.C. § 201(c). 533 U.S. at 487-488. That provision grants owners of collective works the privilege of reproducing the individual works making up the collective work *only* as part of the collective—not individually. See *id.* at 488.

The sole question in *Tasini* was whether that privilege was exceeded when the New York Times licensed electronic publishers like Lexis/Nexis to copy newspaper articles into computerized databases. See *id.* at 488-493. The Court held that the publishers had exceeded the privilege because the databases stripped the articles of context and presented them as individual works, not parts of a whole. See *id.* at 498-504. The notion that *Tasini*, a decision narrowly focused on Section 201(c), somehow resolved the unrelated question here—who "does" the copying—is fanciful.

Petitioners nevertheless insist that two sentences in *Tasini* support their position. Pet. 21-22. The cited passage rejected the publishers' argument that the plaintiffs could assert only contributory infringement because *customer* copying (in retrieving articles from the databases) determined whether the articles appeared as part of a collection. 533 U.S. at 504. The Court disagreed with the *premise* of that argument, concluding that the publishers had made (and then sold) their *own* infringing copies by copying the separate articles *into* the databases, wholly apart from any customer command: "The Electronic Publishers * * * are not merely selling 'equipment' [as in *Sony*]; they are selling copies of the Articles. And, as we have explained, it is the *copies themselves, without any manipulation by users*, that fall outside the scope of the § 201(c) privilege." *Ibid.* (emphasis added). That was precisely the plaintiffs' claim: "that their copyrights were infringed when [the publishers] *placed the Articles in the * * * databases*." *Id.* at 491 (emphasis added). That ruling says nothing about who "does" any copying when customers use an automated system to make copies. *No* court, in the seven years since *Tasini*, has ever read

those sentences as having addressed, much less settled, that issue.[5]

2. Nor does the decision below conflict with *Princeton University Press* v. *Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc). Petitioners urge that, under *Princeton*, a defendant "charged with *direct* infringement" cannot "'stand in the shoes of [its] customers'" by invoking their fair-use defense. Pet. 20-21 (quoting 99 F.3d at 1389) (emphasis added). But the Second Circuit nowhere held otherwise. It held that, because the customer and not Cablevision "does" the copying, Cablevision is not a direct infringer. *Id.* at 18a-24a. Moreover, as the Second Circuit explained (*id.* at 21a-22a), the defendant in *Princeton* was a *full-service* copyshop whose *employees* used the machines to make copies. See 99 F.3d at 1384. It was therefore undisputed that the employees were "doing" the copying.

Petitioners likewise err in claiming that the Fifth Circuit's unpublished, one-line *per curiam* affirmance in *Playboy Enterprises, Inc.* v. *Webbworld, Inc.*, No. 98-10097, 1999 WL 25053 (5th Cir. Jan. 8, 1999), conflicts with the decision below because it "refused to recognize" the *Netcom* principle. Pet. 28. *Webbworld* did not reject *Netcom*. It concluded that the defendant was liable under *Netcom*'s analysis because it took "'affirmative steps to cause the copies to be made'" by using software to "troll" the Internet for images, making illegal copies *without anyone else's involvement*. See 991 F. Supp.

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[5] Justice Stevens' statement that "[p]erhaps it would be more accurate to say that NEXIS makes it possible for *users* to make and distribute copies," 533 U.S. at 518 n.14, does not change the majority's analysis. The majority did not disagree with Justice Stevens' observation that users were the ones who retrieved articles; it disagreed with his premise that the articles did not infringe until they were retrieved. See *id.* at 504.

543, 552-553 (N.D. Tex. 1997) (quoting *Netcom*, 907 F. Supp. at 1381). That made the defendant a direct infringer: It was not "contributing" to someone else's copying; it was doing the copying itself. Petitioners themselves described *Webbworld* as one of the "*Netcom* cases" below. Turner C.A. Br. 38.

C. The Decision Below Does Not Immunize Automated Systems

Petitioners and their *amici* assert that the Second Circuit's ruling will "fundamentally distort * * * the exploding market for automated services" by "treating commercial intermediaries as presumptively immune from direct liability." Pet. 22. But they ignore the limited scope of the Second Circuit's ruling. The court answered only the narrow question presented: Who makes the copies with the RS-DVR—Cablevision (which designed, houses, and maintains the system) or the customer (who chooses what to record and uses the system to record it). In answering that question, the court applied the same standard that courts have applied for over a decade, without any of the disastrous consequences petitioners predict. And given the undisputed fact that customers make the copies when they use VCRs, self-service photocopiers, or set-top DVRs, the court's conclusion that customers likewise do the copying when they use the RS-DVR was unexceptional.

The Second Circuit, moreover, expressly preserved the possibility that "one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." Pet. App. 26a. And the court's holding applies only to automated systems that another person uses to make copies—not all automated systems generally. See *id.* at 20a.

More fundamentally, virtually every claim that petitioners make is marred by their failure to appreciate that the Second Circuit did not rule on copyright liability generally—only direct infringement. As the court observed, where *illegal* copying occurs, secondary-liability doctrines "stand[] ready to provide adequate protection." Pet. App. 24a. This Court had no difficulty allowing a suit against illegal file-sharing networks in *Grokster*—not because the defendants "did" the copying, but because they *induced* copying by consumers. 545 U.S. at 941. The Court noted that the technology made it difficult to sue individual direct infringers, but viewed that as an "argument for imposing indirect liability," not for ignoring the traditional bounds of direct liability. See *id.* at 929-930. Courts have repeatedly invoked traditional contributory-infringement doctrines to shut down automated systems used for illegal copying. See, *e.g.*, *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In *Netcom* itself, the court allowed a contributory-infringement claim. 907 F. Supp. at 1373-1375. As Professor Goldstein explains, the proliferation of "digital technologies for the storage, retrieval and transmission of entertainment and information" "underscore[s] the importance of *secondary* liability doctrines in the twenty-first century." 2 Goldstein § 8.0, at 8:2 (emphasis added).

Here, petitioners could not allege contributory infringement because consumer time-shifting is lawful. But that hardly makes the decision below momentous. New technologies that facilitate *lawful* consumer conduct should be encouraged, not prohibited. While petitioners accuse Cablevision of "exploit[ing]" their works (Pet. 19), nothing in the Copyright Act gives authors the right to demand royalties from every business that merely enables *lawful* fair use of their works. In the unlikely event that the decision below spawns *illegal* copying, there will

be time enough for this Court to act. But there is no reason to grant review in a case involving *lawful* consumer time-shifting based on petitioners' dubious predictions. Moreover, the parties' stipulations—petitioners' agreement to claim only direct infringement and Cablevision's agreement to waive its fair-use defense—render this dispute an unsuitable vehicle for resolving broader questions about the lawfulness of automated technologies.

If any rule would "fundamentally distort" the market, it is petitioners'. They never explain how a court could deem Cablevision a direct infringer without also banning the 27 million set-top DVRs that cable and satellite companies already provide. Those companies similarly provide both television programs and recording equipment, retain ownership of the equipment, prevent access to its contents, and limit subscribers' use, all in the context of an ongoing relationship. See p. 4, *supra*. The only real difference is where the recordings are stored. But that makes no difference to who "does" the copying. Petitioners' implicit assumption that a standard DVR or VCR is lawful but the RS-DVR is not cannot be reconciled with the goal of "technology-neutral copyright law" that their own *amici* purport to champion. Copyright Alliance Br. 13.

II. The Second Circuit's Buffering Ruling Does Not Warrant Review

Petitioners also seek review of the Second Circuit's buffering decision. But that decision is correct; it creates no circuit split; and this case is not an appropriate vehicle for review.

A. The Second Circuit's Ruling Conforms to the Statute's Text

The Copyright Act grants authors the exclusive right "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). "Copies" are "material objects * * * in which a

work is fixed." *Id.* § 101. And a work is "fixed" only if its "embodiment in a copy * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.* Congress imposed that limitation in order to "exclude * * * purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television * * * , *or captured momentarily in the 'memory' of a computer.*" H.R. Rep. No. 94-1476, at 53 (emphasis added).

The Second Circuit's holding that RS-DVR buffer data is not a "copy" under that standard was plainly correct. *All* digital devices—cell phones, digital microphones, digital televisions, set-top DVRs—momentarily buffer data as it is processed and routed. See Pet. App. 54a. The RS-DVR is no exception. It briefly stores tiny snippets of incoming program data in a "BMR buffer" to modify the transmission rate. See *ibid.* That buffer "holds no more than 1.2 seconds of programming at any time," and it holds that data for no more than 1.2 seconds. See *id.* at 5a. Data in the RS-DVR's "primary ingest buffer" is more fleeting still—that buffer holds no more than 0.1 seconds of programming at a time, for no more than 0.1 seconds. See *ibid.* The data in those two buffers—which is overwritten the moment after it is created as data constantly streams through—clearly does not last "for a period of more than transitory duration." 17 U.S.C. § 101. It is precisely the sort of "purely evanescent or transient reproduction[] * * * captured momentarily in the 'memory' of a computer" that Congress intended to exclude. H.R. Rep. No. 94-1476, at 53.

Petitioners offer no coherent response. They fault the court of appeals for adopting a "durational requirement." Pet. 17. But that is exactly what the statute's "for a period of more than transitory duration" clause imposes. And while petitioners urge that the "transitory duration"

clause is too remote from the word "embodiment" to modify it, Pet. 32, the clause immediately follows the phrase it modifies: It defines the minimum period for which something must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 101.

Petitioners argue that, so long as an embodiment lasts long enough "to permit the work's perception, reproduction, or communication," it is a copy. Pet. 30-31. But that is what the statute would say if the "transitory duration" clause were not there—if the Act covered *any* reproduction that was "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated." Congress added to the end of that clause the phrase "for a period of more than transitory duration." That phrase must mean something, but petitioners simply read it out of the statute.[6] For that reason, the Second Circuit properly declined to follow the Copyright Office's 2001 *DMCA Report*, which proposed a similar dividing line. See Pet. App. 15a-16a. "[T]he Office's interpretation does not explain why Congress would include language in a definition if it intended courts to ignore that language * * * ." *Id.* at 16a.

The Second Circuit's disagreement with a non-binding report would not justify review under any circumstances. But the Office is now reconsidering its position, acknowledging the "Second Circuit's reminder that the fixation requirement does require an element of duration" and conceding that its prior position was intended to be "pro-

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[6] Petitioners do not renew their argument below that the "transitory duration" clause measures how long a recording *created from* the buffer data must last. Turner C.A. Br. 49-50. That unnatural reading is contrary to the legislative history. Images "projected briefly on a screen" can be filmed and then stored indefinitely, but Congress intended to exclude them. H.R. Rep. No. 94-1476, at 53.

vocative." U.S. Copyright Office, *Public Hearing: Section 115 Notice of Proposed Rulemaking* 3:11-12, 11:3-4 (Sept. 19, 2008). The Office has not yet decided "whether the Second Circuit's critique of the Office's analysis is compelling." *Compulsory License for Making and Distributing Phonorecords*, 73 Fed. Reg. 66,173, 66,177 (Nov. 7, 2008).[7]

Besides, the Copyright Office's *DMCA Report*, while deeming buffer data to be fixed, concludes that buffering is likely *lawful fair use*. See U.S. Copyright Office, *DMCA Section 104 Report* 133-141 (Aug. 2001). Professor Goldstein reaches a similar result under the *de minimis* doctrine (which provides an alternative ground for affirmance, see Pet. App. 18a). See 2 Goldstein § 7.0.2, at 7:9. Thus, the only real dispute is over *which theory* renders transient data buffers lawful—not *whether* they are lawful. Petitioners may urge that Cablevision gave up the fair-use theory the Copyright Office endorsed. But that only highlights why this is not a proper vehicle for review. Any decision that addressed the legality of buffering without addressing fair use could only sow needless uncertainty in the law.

Petitioners finally suggest that, even if other transient data buffers are lawful, the BMR buffer is not because "1.2 seconds is not 'fleeting' for a computer." Pet. 31. That argument was not preserved. Petitioners claimed below that there was *no* durational requirement (beyond

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[7] *Amicus* NMPA argues that the Second Circuit's holding interferes with the Copyright Office's Section 115 rulemaking. See NMPA Br. 16-20. But two days after NMPA filed that brief, the Office issued its interim rule, explaining that it did not need to resolve the buffering issue. See 73 Fed. Reg. at 66,177. Moreover, NMPA has characterized the Second Circuit's decision as "highly fact-dependent" and thus lacking broader significance. NMPA Section 115 Comments 11-12 (Aug. 28, 2008), http://www.copyright.gov/docs/section115/comments-3/rm2000-7_nmpa_sga_nsai_aimp.pdf.

the capability of being perceived, reproduced, or otherwise communicated). But they never argued that, if such a requirement exists, 1.2 seconds is too long. There is no reason for this Court to address the factbound issue of whether this particular buffer data lasts for a "more than transitory duration," especially absent a lower-court decision addressing the issue.

B. There Is No Circuit Conflict

The only other court of appeals to have addressed transient data buffers reached the same conclusion as the decision below. In *CoStar*, the Fourth Circuit ruled that, "[w]hen an electronic infrastructure is designed and managed as a *conduit* of information," the "temporary electronic copies [that] may be made in this transmission process * * * would appear not to be 'fixed' in the sense that they are 'of more than transitory duration.'" 373 F.3d at 550-551. The buffer data here is precisely the sort of temporary storage incident to transmission that the Fourth Circuit described.

Petitioners assert a conflict with *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), and its progeny. Pet. 29-32. But they ignore the Second Circuit's thorough discussion of those cases. See Pet. App. 11a-15a. As the court explained, the parties in *MAI* disputed only whether data in computer memory could *ever* be "fixed"—not whether the *particular data in that case* lasted long enough to be fixed. See 991 F.2d at 517-519. That is unsurprising. The case did not involve fleeting buffer data. It involved data that resided in memory long enough for a technician to "view the system error log and diagnose the problem with the computer." *Id.* at 518. The data was thus "embodied in the RAM for at least several minutes." Pet. App. 13a; see *Advanced Computer Servs. of Mich., Inc.* v. *MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994). None of the decisions invoked by

petitioners involved the sort of truly fleeting buffer data at issue here—data that exists for only a flash and then is gone.

III. The Second Circuit's Public Performance Holding Does Not Warrant Review

Petitioners assail the Second Circuit's public performance ruling as "profoundly destabilizing." Pet. 36-37. But allowing a customer to play back his *own* recording, that *he* made, to *himself and no one else* is not a "public" performance in any sense. And the decision will have none of the effects that petitioners predict.[8]

A. The Second Circuit's Ruling Accords with the Statutory Text and Common Sense

1. A person "performs" an audiovisual work by "show[ing] its images in any sequence." 17 U.S.C. § 101. And, under the statutory definition at issue here, a person performs a work "publicly" if he "transmit[s] * * * a performance * * * of the work * * * *to the public*." *Ibid.* (emphasis added). Accordingly, there is no invasion of the public performance right unless the transmission of a performance is "to the public."

Just like a VCR or set-top DVR, the RS-DVR permits customers to record live programming and play back their own recordings to themselves in their homes. Although the RS-DVR, unlike those other technologies, plays back a recording by means of a transmission, there still is no *public* performance unless the transmission is "to the public." As the Second Circuit concluded, an RS-DVR transmission is no more "public" than a VCR or set-top DVR playback: In each instance, there is a "potential audience" of one—the person who made the recording.

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[8] The Second Circuit did not reach Cablevision's argument that the customer, not Cablevision, "does" the performing—an alternative ground for affirmance. See Pet. App. 28a.

See Pet. App. 36a, 39a. "[I]f a transmission is only available to one person, then it clearly fails to qualify as 'public.'" 2 Nimmer § 8.14[C][2], at 8-190.6.

2. Petitioners call attention to the portion of the statutory definition stating that a transmission of a performance can be "to the public" "whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. Petitioners insist that RS-DVR playback is a public performance because customers receive performances at separate places and different times. Pet. 33-34. But the separate places/different times clause does not expand the statute beyond transmissions of performances "to the public." It merely clarifies that, *if* a transmission of a performance is "to the public"—*i.e.*, generally available—it is not artificially excluded from coverage merely because only one person actually receives it at a time. See 17 U.S.C. § 101.

Indeed, the separate places/different times clause confirms that the size of the "potential audience" is what matters. As the Second Circuit explained, "[t]he implication from this same language * * * is that it is relevant, in determining whether a transmission is made to the public, to discern who is 'capable of receiving' the performance being transmitted." Pet. App. 29a (quoting 17 U.S.C. § 101). The legislative history confirms that focus, stating that a performance is public where "the transmission is *capable* of reaching different recipients." H.R. Rep. No. 90-83, at 29 (1967) (emphasis added).

The separate places/different times clause thus encompasses video-on-demand ("VOD") systems in which a provider selects a library of recorded content and makes it available via transmission to anyone willing to pay. See C.A. App. 771, 1180-1182. Such systems fall within the statutory definition because any member of the public

willing to pay is "*capable* of receiving" a transmission of a performance from the provider-procured copy of the work in the library. With the RS-DVR, by contrast, "the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." Pet. App. 36a.[9]

Ordinary meaning supports that distinction. Something is "public" if it is "[o]pen or available for all to use, share, or enjoy." *Black's Law Dictionary* 1264 (8th ed. 2004); see *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438-439 (1973). That is true even if it is actually used on a one-at-a-time basis. A phone booth is "public" because anyone willing to pay can use it—even though only one person occupies it at a time. But a house open only to the person who built it is not "public." Similarly, videos in a VOD library are offered "to the public" via transmission because anyone willing to pay can view them—even though, once a transmission begins, only one person actually receives it. But RS-DVR recordings are not available "to the public." Each one is available for transmission solely to the customer who made it. Pet. App. 36a.

Nor does it matter that multiple RS-DVR subscribers could happen to record and play back the same television programs (*i.e.*, the same "works"). As the Second Circuit stated, what matters under the statute is whether a particular *transmission of a performance of a work* is made publicly available—not whether the *work itself* is publicly available. See Pet. App. 31a-32a; H.R. Rep. No. 90-83, at

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[9] Petitioners urge that the RS-DVR uses a "VOD network" and "VOD architecture." Pet. 8. But what matters is the technology's application, not its provenance. A commercial movie projector in a public theater renders public performances. But if the owner takes that projector home to watch movies by himself, that is a private performance.

29; 2 Nimmer § 8.14[C][2], at 8-190.6. Because an RS-DVR playback is available only to the person who made the recording, the transmission is private, not public.[10]

B. There Is No Circuit Conflict

Contrary to petitioners' contention (Pet. 34-36), the decision below fully accords with *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), and the other cases that followed *Redd Horne* on analogous facts. The Second Circuit expressly embraced *Redd Horne* and correctly concluded that its rationale precludes liability on the facts here. Pet. App. 37a-39a.

In *Redd Horne*, a video store transmitted movies to patrons in viewing booths. The court held those performances "public" because "[a]ny member of the public [could] view a motion picture by paying the appropriate fee." 749 F.2d at 159. The court found "particularly pertinent" Professor Nimmer's statement that "'*if the same copy* * * * of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance.'" *Ibid.* (quoting 2 *Nimmer on Copyright* § 8.14[C][3], at 8-142 (1983)). "It is *only* when the *same copy of a given work* gives rise to numerous performances by different members of the public that each such performance * * * will be regarded as a public performance, because the public at large receives performances 'at different times,' *all emanating from the same copy*." 2 Nimmer § 8.14[C][3], at 8-192.2(2) (emphasis added). The Third Circuit found that standard met because, "[a]lthough [the

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[10] Petitioners and *amici* argue that the Second Circuit permitted an "end run around the limitations of [the] § 111 license." Pet. 38; see MLB Br. 6-20. But Section 111 permits certain simultaneous retransmissions that would otherwise be infringing public performances. See 17 U.S.C. § 111(c), (f). It does not convert private performances into public ones.

video store] has only one copy of each film, it shows each copy repeatedly to different members of the public." 749 F.2d at 159. As the Second Circuit explained, *Redd Horne*'s own reasoning distinguishes the RS-DVR: Because no subscriber's recordings are ever shown to anyone but the subscriber himself, the performances are private. See Pet. App. 37a-39a.

That distinction is critical under a statute focused on "transmi[ssion] [of] * * * a performance" of a work "to the public." Where a defendant has one copy of a work and offers to play it for anyone willing to pay a fee, the transmissions are "to the public" because anyone can receive them. By contrast, where an individual purchases or records his own copy and can play it only to himself, the transmission is *not* generally available. If 100 consumers each purchased the same Miles Davis song from Apple's iTunes store, separately stored the song on Apple's .mac remote-storage backup service, and separately listened to their respective copies of the song by streaming the song to themselves from the remote server, no one would think Apple had publicly performed the song. The RS-DVR is no different.

No court has ever rejected the interpretation that *Redd Horne*, Professor Nimmer, and the court below all followed. Congress's carefully crafted language preserves the distinction between public performances and private ones. Petitioners' construction obliterates it.[11]

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[11] *Amici* suggest that the Second Circuit's decision conflicts with certain treaties. See BMI/ASCAP Br. 21-24; Sony BMG Br. 24-27. But even the broadest treaty applies only to "*communication[s] to the public* of [the author's] works, * * * including the making available to the public of their works [on an on-demand basis]." WIPO Copyright Treaty, art. 8, Dec. 20, 1996, 36 I.L.M. 65, 70 (emphasis added). Just as the RS-DVR does not make transmissions of performances "to the public" under the Copyright Act, it does not make "communication[s] to the public" under that treaty.

C. Petitioners' Claims of Impact Are Unfounded

As the foregoing makes clear, petitioners and their *amici* misread the Second Circuit's decision when they insist it will lead to unlicensed video-on-demand and similar services. See Pet. 36-38; BMI/ASCAP Br. 6-11. Such services clearly transmit content "to the public" under the Second Circuit's reasoning. See pp. 27-28, *supra*.

Petitioners hypothesize a video-on-demand system that automatically makes a *separate copy* of each requested program for each customer from its central library and then transmits a performance to the customer from that separate copy. Pet. 37. That petitioners' claim of importance derives from a *hypothetical* system underscores the absence of any pressing need for review. And the Second Circuit explained why such a system would not work: The operator would still face direct or contributory liability for the unlawful reproductions. Pet. App. 41a-42a. As *Grokster* makes clear, consumers have no general right to duplicate copyrighted works from the collections of others. The RS-DVR is different because consumers do have a right to record television programs as they air for later viewing under *Sony*. Even for purposes of the public performance right, a transmission system built on a central library of provider-procured copies is not analogous to the RS-DVR, which does no more than allow consumers to play back their own lawfully recorded time-shifting copies, just like a VCR or standard DVR. Finally, if anyone ever offers petitioners' hypothesized VOD system in the face of such potential liability, courts can address the legality of the system at that time. There is no reason to grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC. ET AL.,
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v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE BRIEF OF THE UNITED STATES

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The Government's arguments against review actually serve to demonstrate why a grant of certiorari is urgently needed. As Petitioners have shown, the Second Circuit's decision treating Cablevision's on-demand delivery of copyrighted programming as equivalent to Sony's sale of a VCR intensifies a troubling trend in the lower courts toward viewing secondary liability – based derivatively on consumer conduct – as the only way to enforce copyrights against commercial services delivering content digitally. Far from rebutting this point, the Government's brief drives it home by arguing that Petitioners should be denied review because they sued Cablevision for direct and not secondary infringement.

It is also telling that to oppose review, the Government is forced to offer various extreme and unpersuasive interpretations of the Copyright Act and prior case law, while simultaneously ignoring the breadth and novelty of the legal standards the Second Circuit applied. It remains clear that the Second Circuit read the Act in ways that cannot be squared with the statutory language or prior rulings of other courts. Indeed, the Government admits that the court below completely misunderstood the key statutory definition of public performance as it applies to on-demand services.

The resulting confusion about how the Act applies to emerging models for electronic delivery will inhibit legitimate investment while encouraging a proliferation of unlicensed services that will become entrenched before their illegality can be firmly

established. The Government simply ignores that practical reality without offering a response. Unless this Court acts now, a corrective decision years down the road will not be able to undo the damage.

I. Review Is Urgently Needed.

A. Deferral of Consideration of the Questions Presented Makes No Practical Sense.

The Court should not accept the Government's call to allow the issues presented to "percolate" further. The many media companies here challenged Cablevision's service on direct liability grounds for good reason. Cablevision seeks not to sell copying equipment or software, which would properly be analyzed under secondary liability, but to deliver Petitioners' actual copyrighted content to consumers without authorization, which can properly give rise to direct liability. Thus, Cablevision's theory that this case is governed by *Sony Corp. of America v. Universal City Studio, Inc.*, 464 U.S. 417 (1984), radically upends copyright law by inverting the proper relationship between direct and secondary liability claims. And the Second Circuit's acceptance of that theory creates an urgent need for review. As shown by the outpouring of amicus support for Petitioners (and heavy amicus involvement on both sides below), this case is a bellwether. Denial of certiorari will leave in place massive uncertainty about how copyright law applies to digital content delivery.

The Government's brief itself shows why review is needed by suggesting that the Second Circuit's ruling was reasonable in light of *Sony* and faulting

Petitioners for not casting their case in terms of secondary infringement. That illustrates how this Court's decision in *Sony* is morphing into an unlikely template for all copyright challenges to digital content delivery services. It makes no sense to suggest that a commercial business selling copies or performances of copyrighted works delivered electronically can, at most, be secondarily liable for what its customers do. This Court must correct that serious misreading of its own precedent to clarify the proper and primary role of *direct* liability claims in the digital world, just as in the physical one. *See also infra* at 6-7 (observing that direct liability is typically the *only* available remedy for paradigmatic copyright piracy).

The Government's call for "percolation" also resolutely ignores practical reality by never even mentioning – much less answering – Petitioners' showing that review is needed now because of the lightning pace of change in the models for content delivery. Even if someone did challenge another company's RS-DVR service in another circuit in the future – a prospect that is highly speculative assuming the failure of this substantial challenge brought by major media companies – it would take years for a conflict to arise and then be resolved. That will be too late. In our digital age, five years is like a half century in eras of less rapid technological development. By the time this Court might consider the RS-DVR again in another case, these unlicensed and profitable services will have become entrenched in the marketplace and difficult if not impossible to dislodge.

In those intervening years, the uncertainty created by the Second Circuit will also inevitably affect how *other* content delivery models evolve. Aggressive operators will accept the Second Circuit's multiple invitations to set up new kinds of unlicensed services. Meanwhile, investment in extant and future licensed on-demand services will likely dry up in the face of that unlicensed competition. A decision by this Court upholding the rights of copyright owners years hence will therefore have little practical utility. The rapid introduction of many types of unlicensed on-demand service on cable, the Internet, and other media will have transformed business models and consumer expectations in ways that cannot be unscrambled.

Moreover, by the Government's logic, no case involving new unlicensed ways of exploiting copyrighted works will ever be appropriate for the Court to review. The Government contends that set-top DVRs are beyond legal challenge because they are now prevalent in the marketplace and, in any event, differ only incrementally from the VCRs addressed in *Sony*. And it contends that RS-DVR services should likewise escape review because they purportedly differ only incrementally from set-top DVRs – although the Government concedes that Cablevision's transmission of Petitioners' programming into subscribers' homes fundamentally distinguishes RS-DVR from set-top DVRs under copyright law, *see* U.S. Br. 20. By the same logic, review will not be warranted once RS-DVR is entrenched and the next unlicensed service makes another "incremental" modification, such as

elimination of the multiple copies created by Cablevision's service (which serve no functional purpose in any event). Yet, this series of incremental steps already has crossed the threshold to permit the wholesale commercial exploitation of copyrighted content without a license. As noted, the Government's own brief provides dramatic proof of how *Sony*'s narrow ruling about the sale of an article of commerce used exclusively within the home has mutated into a rule viewed by many as governing all infringement claims against commercial on-demand content delivery services.

B. Each Holding Below Creates a Conflict of Authority.

The Government is just as unpersuasive when it denies that the Second Circuit's rulings depart from prior decisions of this Court and other circuits. It asserts that none of the Second Circuit's "specific holdings" creates a conflict. U.S. Br. 8. But as the careful emphasis on "specific" holdings suggests, that is true only in the inconsequential sense that no other court has specifically addressed an RS-DVR service. The Second Circuit's *legal tests* addressing each claim departed substantially from the tests applied by other courts. Such a decision should not evade review just because it ritualistically incants that it addresses only "the facts of this case," when each ruling actually flows from application of a rigid rule turning on a single factor and excluding all other facts as irrelevant.

First, the court held that Cablevision's direct liability for making full-length copies on its servers

depends entirely on whether a human employee becomes involved when consumers select particular programs Cablevision supplies for copying, and that all of Cablevision's other conduct is simply irrelevant. *See* Pet. 8-11, 24-25. That ruling conflicts with *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), which held that computerized services *themselves* engage in copying and distribution of copyrighted articles even when their customers direct the computers to retrieve and deliver those articles. The Government asserts *Tasini* did not address who makes the copies when a customer directs a database to deliver content. U.S. Br. 8. But that was the precise issue when the Court rejected the notion that the databases "could be liable only under a theory of contributory infringement, *based on end-user conduct*," because the databases directly infringed by "*selling* copies of the Articles" – *i.e.*, reproducing and delivering copies in response to consumer requests. 533 U.S. at 504 (emphasis added).

Whether a commercial service directly engages in reproduction or other infringing conduct when it automatically responds to user requests is, moreover, one of the most important questions in copyright law today. The Government tries to trivialize it by noting that the line between direct and secondary infringement is often blurred. But that does not diminish how critical this question is, because in many cases – such as *Tasini* itself, or paradigmatic piracy like manufacturing bootleg DVDs – a commercial service is either liable for infringement directly, or not at all. *See* Pet. 21; Reply 6-7. Yet,

like several other lower court cases (but unlike *Tasini*), the decision below inverts the very structure of copyright law by treating secondary liability as the norm and direct liability as exceptional. That trend, rooted in a fundamental misreading of *Sony*, substantially constricts the ability of copyright owners to secure their rights, particularly with regard to the on-demand services that are becoming the norm in this digital age.

Second, the Government denies any conflict between the Second Circuit's ruling addressing buffer copies and *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), which adopted a single-prong functional test without adding the Second Circuit's separate durational requirement. Pet. 29-30. In denying the split, the Government endorses as "reasonable" the Second Circuit's indefensible reading of *MAI* as not really adopting a test at all, and therefore leaving open the possibility of an additional durational prong *sub silentio*. U.S. Br. 9-10. This is a glaring example of how far the Government had to go in order to respond to Petitioners' arguments for review. As the Copyright Office has recognized, under *MAI* there is only a functional test for what is "fixed."[1] It follows that application of the Ninth Circuit's test would have required a ruling for Petitioners here. That means there is a circuit conflict.

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[1] U.S. Copyright Office, *DMCA Section 104 Report* (Aug. 2001), at 118-19, *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

The position staked out by the Government in fact intensifies the uncertainly created by the Second Circuit's durational requirement. On its face, the ruling below requires a fixed copy to exist longer than 1.2 seconds (the time each portion of a program is reproduced in Cablevision's buffer memory), but does not say how much longer. The Government's brief multiplies the uncertainty with the puzzling assertion that 1.2 seconds may or may not be long enough to be infringing, depending on other unstated and hard-to-imagine factors that are neither part of the statute nor described. U.S. Br. 19-20.

Third, the Government concedes that the Second Circuit, in its analysis of the public performance right, errs in relying on the proposition that "under the transmit clause, we must examine *the potential audience of a given transmission* by an alleged infringer to determine whether that transmission is 'to the public.'" Pet. App. 36a (emphasis added). As the Government acknowledges, "[s]uch a construction could threaten to undermine copyright protection in circumstances far beyond those presented here, including with respect to VOD services or situations in which a party streams copyrighted material on an individualized basis over the Internet." U.S. Br. 20-21. It also conflicts with decisions such as *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984). But the Government says this central defect in the Second Circuit's public performance ruling can be ignored because the court distinguished prior cases as involving transmissions made from a single copy of a work rather than the multiple copies on the RS-

DVR server. U.S. Br. 21. What the Government fails to explain is how that factual distinction is legally significant or logically can be derived from the Act, which makes no mention of copies involved in a public performance. A conflict should not be dismissed because of a factual difference that has no relevance under the Act.

The question whether separate on-demand transmissions of a work to individual audience members constitute a public performance is critically important in the digital era. Indeed, even the Second Circuit's "specific holding" limited to services that use a separate copy for each transmission has sweeping importance because other services will imitate Cablevision's copy-then-play model for evading the license requirement. The Government's response that such other services might be found secondarily liable for copying – but not public performance – is misguided on two counts. First, it again wrongly assumes that secondary liability is an adequate remedy for a commercial enterprise's exploitation of copyrighted works. In addition, it would mean that the public performance right is not separately enforceable in the on-demand era, and can only be enforced indirectly through liability for reproduction. But one of the key innovations of the 1976 Act was to make each § 106 right separately transferable and enforceable. *E.g.*, 17 U.S.C. § 201(d).

Given these conflicts, this case easily meets traditional standards for certiorari, particularly in light of the importance of the issues presented. The Second Circuit's decision moves the law far in the

direction of saying that a computerized service in the *business* of copying and performing content on demand can be challenged, if at all, only for vicarious or contributory infringement. Further percolation is not going to make the resulting legal confusion disappear. But in the meantime that confusion will disrupt technological progress and encourage the emergence of unlicensed services that may be impossible to dislodge if and when the law ever is clarified.

II. The Parties' Stipulation Not To Assert Certain Claims and Defenses Is Not a Vehicle Problem.

The Government is forced to adopt equally extreme positions to argue that the parties' limitation of their claims and defenses "removed two critical issues" constituting "possible grounds for decision." U.S. Br. 6. In reality, the parties cleared away the legal underbrush to expose the real issues.

First, the Government makes the surprising claim that the issues presented are "artificial[ly] truncat[ed]" because Petitioners did not assert a secondary infringement claim. U.S. Br. 6. As the Government itself asserts later in its brief, no secondary infringement claim can be predicated on primary conduct that is noninfringing, and *Sony* held that consumer use of a VCR for temporary time-shifting of broadcast television was a noninfringing fair use. *Id.* at 15. The Government then goes on to emphasize the similarities between the consumer conduct at issue in *Sony* and here, thus suggesting that a secondary infringement claim seeking to enjoin Cablevision's RS-DVR would have fallen short

under *Sony*. *Id.* at 18. In stark contrast, Cablevision's *own* conduct differs completely from Sony's – which is why Petitioners have properly focused on direct liability.

Thus, the Government does not really contend that Petitioners' unasserted secondary liability claim would have been meritorious – just the opposite. Instead, it offers up the mysterious notion that the absence of a secondary infringement claim deprives the Court of "perspective." U.S. Br. 12. But questions of secondary infringement are absolutely irrelevant to each of the questions presented. With regard to buffer copies and public performance, the Second Circuit's rulings preclude all liability, direct *and secondary*. And the hypothetical possibility that Cablevision might be secondarily liable based on consumer conduct for making permanent copies of full programs on its central servers is equally irrelevant to whether Cablevision can automate itself out of direct liability.

Each of these questions is important in its own right, and no secondary liability claim is needed to give "perspective" on them. The absence of a secondary liability claim is no more a vehicle problem here than it was in *Tasini*, or than was the absence of direct infringement claims in *Sony* and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Second, and even more astonishingly, the Government suggests that Cablevision might have been able to assert a valid fair use defense to direct liability if it had not voluntarily waived that defense.

U.S. Br. 12-13. The reason Cablevision was willing to bypass such an argument is that it lacks any legal basis. No case has ever held that a "commercial actor who is charged with direct infringement may defend on the ground that he performed the copying at the behest of a customer who himself would have a fair-use defense." *Id.* at 13.[2] In any event, the remote possibility that Cablevision might have an affirmative defense to direct liability under a theory never recognized by any court is not a vehicle problem for addressing the important questions presented concerning the elements of a prima facie case of infringement, prior to consideration of defenses. Cablevision's decision to waive a meritless defense is no barrier to this Court's review of a deeply flawed and disruptive decision in Cablevision's favor.

Thus, the parties' stipulation in no way "exaggerates the significance of the issues that remain," U.S. Br. 12. To the contrary, it focuses the case on the most appropriate claims and defenses. It is the Government that "exaggerates the significance" of the issues that were stipulated away,

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[2] Remarkably, the Government points to the *dissent* in the most prominent case holding that a commercial service cannot borrow its customers' fair use defense, *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc). Even there, most of the dissenters relied on a case-specific rationale concerning "multiple copies for classroom use" that provides no support for the Government's novel fair use theory here. *Id.* at 1394-95 (Merritt, J., dissenting).

as it strives to support the claim that the case is a poor vehicle for addressing the urgently important questions presented.

CONCLUSION

For the reasons stated here and in prior filings, Petitioners respectfully submit that the case for review is compelling. Certainly the Government has not offered persuasive reasons for any other conclusion. Its brief seems determined to ignore the impact of the Second Circuit's decision, while illustrating Petitioners' point that there is a need to demarcate the rightful scope of *Sony*. The Court should intervene now to provide urgently needed clarity concerning the application of the Copyright Act to rapidly emerging models for on-demand delivery of copyrighted works to consumers.

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Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, Revue Internationale du Droit d'Auteur (forthcoming Jan. 2009), *available at* http://ssrn.com/abstract=1305270.....3-4, 11, 12

Cablevision insists that its own conduct in operating the RS-DVR service cannot directly infringe Petitioners' § 106 rights because that conduct merely substitutes for "time-shifting" that would be lawful if done by subscribers on equipment in their own homes. But the Second Circuit's embrace of that fallacious reasoning is a powerful reason for granting – not denying – review. The question under § 106 of the Copyright Act is whether *Cablevision's* conduct directly violates Petitioner's exclusive rights. Exonerating a commercial enterprise based on what its customers do would gut copyright law – as exemplified by the Second Circuit's unprecedented constriction of the reproduction and public performance rights in this very case.

Hence, Cablevision's mantra that subscribers use its RS-DVR service in the same way they use in-home VCR or DVR devices is a red herring. With respect to Cablevision's own conduct, the two situations are completely different. When a subscriber has a set-top VCR or DVR, Cablevision provides traditional cable service by transmitting its *licensed* real-time stream of programming, and the subscriber autonomously uses the device in the home for all copying and playback. For its RS-DVR service, in contrast, Cablevision splits its transmission into a second, unlicensed stream; makes two buffer copies of all programming from the unlicensed stream; exercises its discretion to choose which program channels it will copy and replay when requested by subscribers; makes and stores copies of entire programs when requested, on massive servers

at central facilities that it staffs and operates around the clock for this purpose; and transmits performances of the programs it has copied from those central facilities to subscribers' homes on demand. Pet. 8-11; Pet. App. 51a-61a. This conduct is nothing like "the sale of an article of commerce" appropriately analyzed as a question of secondary liability. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984). Cablevision's conduct here comprises the very acts § 106 reserves exclusively to copyright owners – copying and transmission of programs. Even the Second Circuit acknowledged that "[i]n this respect, RS-DVR more closely resembles a VOD service." Pet. App. 6a.

Only by ignoring what Cablevision does could the Second Circuit condone Cablevision's brazen usurpation of Petitioners' reproduction and public performance rights. That outcome is particularly intolerable because Cablevision's unlicensed exploitation of Petitioners' works jeopardizes the value of the *licensed* video-on-demand services that are made available on cable with Petitioners' authorization.

By the same token, only a singularly result-driven focus premised on a misreading of *Sony* can explain the Second Circuit's remarkable holdings that the permanent copies Cablevision creates in response to user requests are not made by Cablevision; that the buffer copies Cablevision makes in order to create the permanent copies are not reproductions; and that Cablevision is not

publicly performing programs when it transmits performances of them to subscribers on demand. As the Petition demonstrated, and Cablevision fails to refute, those rulings drastically narrow the exclusive rights of reproduction and public performance in ways that conflict with the statutory language and its interpretation by other Circuits and the Copyright Office.

Nor is there any doubt that the Second Circuit's decision threatens harms far beyond the confines of this case. The outpouring of support for the Petition from an array of amici with no direct interest in Cablevision's service – copyright owners, other business interests, and scholars – makes perfectly clear that this is a case of genuine national importance. Those briefs (and the many amicus briefs on both sides below) reflect the reality recognized by everyone with any stake in the vitality of the nation's content and information industries: the decision below has sweeping implications in the digital age, particularly for automated and on-demand services. It stands out among recent cases that have "narrowly construed ... [copyright owners'] exclusive rights ..., thus putting into doubt their efficacy in the digital environment. ... [T]he Second Circuit's ... decision ... could substantially eviscerate the reproduction and public performance rights." Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, at 1, Revue Internationale du Droit

d'Auteur (forthcoming Jan. 2009) (hereinafter, *Recent Developments*).[1]

The Court should not accept Cablevision's invitation to stand by while the RS-DVR service and the further harmful repercussions of this flawed decision become an entrenched reality. Automated digital services are revolutionizing copyright industries today. Pet. 6-7. The Second Circuit's decision provides a blueprint for new automated businesses seeking windfall profits by providing copyrighted works to consumers without the long-accepted obligation to obtain a license. Once these parasitic business models become widespread, they will be virtually impossible to uproot by post-hoc judicial decisions.[2] Lower courts and industry leaders need a definitive ruling on the law now, as the boundaries of permissible automated services are being drawn. Particularly given the existing divisions of authority as to each question presented, review is essential, before even greater harms materialize. *See* Professors' Amicus Br. 4-9.

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[1] Citations are to the manuscript at http://ssrn.com/abstract=1305270.

[2] Here a page of history is a worth a volume of logic. Napster inflicted devastating harm on the recording industry within months of its initial launch, and its entrenched peer-to-peer progeny continue to inflict such harms years later, despite *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

I. The Second Circuit's Misinterpretation of *Sony* Merits Review.

The Second Circuit reasoned that the lawfulness of Cablevision's conduct must be analyzed under principles of secondary infringement, rather than direct liability, because the subscriber conduct here superficially resembles the time-shifting held to be fair use in *Sony*. Pet. App. 20a-21a, 23a-26a. That reasoning inverts the relationship between direct and secondary liability and creates a gaping loophole in copyright remedies against commercial services whose own conduct is infringing when the conduct of their customers assertedly is not.

Cablevision suggests the Second Circuit did not misread *Sony* in this way. But the court unambiguously relied on *Sony* when it rejected direct liability due to the perceived similarity of Cablevision's customers to VCR users, and invoked *Sony* as "buttress[ing]" its "refusal to find Cablevision directly liable." *Id.* That was no accident. Cablevision's lead argument to the Second Circuit was that it would be an "end-run" around *Sony* to impose direct liability on Cablevision if *Sony* protected its subscribers' conduct as fair use. Appellants' Br., *Cartoon Network LP v. CSC Holdings Inc.*, No. 07-1480- CV(L), at 16-18, 25-26 (2d Cir. filed May 30, 2007).

Cablevision's "end-run" argument – and the Second Circuit's acceptance of it – presupposes that if its customers' use of its service were noninfringing, that would preclude direct liability against Cablevision itself. That conflicts with settled law.

"Third party conduct" is "wholly irrelevant in an action for direct infringement." *Sony*, 464 U.S. at 446. Accordingly, an accused direct infringer may not stand in the shoes of its customers or assert their noninfringing use to bar liability based on its own infringing conduct. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc).

The Second Circuit's misunderstanding of *Sony* as favoring secondary over direct copyright liability eviscerates the core protections of copyright law. Paradigmatic copyright pirates – businesses that copy or transmit programs for profit without a license – are direct infringers because their own conduct violates the § 106 exclusive rights. Yet, if their customers merely buy and watch DVDs or view streamed transmissions, and thus do not commit predicate acts of direct infringement under § 106, these infringing businesses would typically not be secondarily liable.

Hence, the Second Circuit and Cablevision are flat wrong to insist that "where *illegal* copying occurs, secondary-liability doctrines 'stand[] ready to provide adequate protection.'" Opp. 20 (quoting Pet. App. 24a). Secondary liability presupposes that *someone else* is a direct infringer. Thus, it provides no protection at all against a commercial copyright pirate's *own* "illegal copying." Secondary infringement principles are both inapt and inadequate in these situations. Such commercial infringers are directly liable, regardless of whether the conduct of their customers is infringing or

noninfringing. The same is true when Cablevision copies and transmits unlicensed programming to its paying subscribers.

II. The Second Circuit Drastically Narrowed the Reproduction Right.

A. Permanent Copies

To justify its conclusion that Cablevision does not directly infringe the reproduction right, the Second Circuit excluded as irrelevant all of "Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy," and held that Cablevision would be directly liable *only* if a "human employee" committed "volitional conduct" when a specific program was chosen for unlicensed copying. Pet. App. 20a, 22a. That rule conflicts with *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), other authorities, and common sense. It insulates every automated service from direct liability, and thus presumes that copyrights in the digital age are protected solely by secondary liability, which requires proof of predicate acts of infringement by customers.

To disguise the conflict with *Tasini*, Cablevision mischaracterizes that case as being solely about copying articles *into* automated databases, not about making copies *from* the databases when requested by users. Opp. 17. In fact, *Tasini* held that the database operators directly infringed by "selling copies of the Articles." 533 U.S. at 504. The "copies" sold were, of course, those automatically created in response to user requests – not the source copies stored in the databases. That is consistent with the

Court's emphasis throughout on unlicensed copying *and* distribution. *E.g.*, *id.* at 503-04, 506. The Court even analogized the database operators to automated versions of a library where, "[i]n response to patron requests, an inhumanly speedy librarian would search the room and *provide copies of the articles* matching patron-specified criteria." *Id.* at 503 (emphasis added). The Court firmly rejected the contention that secondary liability should provide the rule of decision when a database operator automatically makes copies requested by users. *Id.* at 506.

Thus, *Tasini* held the database operators *directly* liable for doing what Cablevision does here. While *Tasini* did not belabor the point, that hardly justifies Cablevision's insinuation that the Court's words were ill-considered or careless. The Court was succinct because the answer was clear. And the Second Circuit's decision conflicts directly with *Tasini* on this point. To the extent *Tasini* is open to the misinterpretation Cablevision advances, or is simply being ignored (as in the decision below), that reinforces the need for review.

The Second Circuit's "volition" principle also conflicts with the settled rule that both a business *and* its customers can be direct infringers. Pet. 19 n.4; Opp. 15 n.4 (acknowledging rule). The Second Circuit treated direct infringement as an either/or issue, reasoning that Cablevision could not be "doing" the copying if Cablevision's customers were. *E.g.*, Pet. App. 23a-24a (reasoning that Cablevision's

conduct does not "*displace* the customer as *the person* who 'makes' the copies") (emphasis added).

Nor can the Second Circuit's "volition" requirement be reconciled with the broad statutory language "to do and to authorize." 17 U.S.C. § 106.[3] Even if that language excludes purely involuntary or incidental copying of the kind at issue in *Netcom*, there is nothing involuntary or incidental about what Cablevision does. And there is certainly no statutory basis for requiring the particular kind of "volition" demanded by the Second Circuit, which turns on whether a human employee selects the specific works to be copied at any given time.

The Second Circuit's ruling amounts to a robot exception to direct liability for commercial copying services that deploy computers in place of human employees, and a presumption that such conduct must always be analyzed under principles of secondary liability. The sweeping scope of that ruling, and the conflict with *Tasini*, necessitate review.

B. Buffering

Denying a circuit split concerning buffer copies, Cablevision incorrectly contends that *MAI* and its

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[3] Cablevision incorrectly asserts that Petitioners cannot cite the "to authorize" language in § 106. Petitioners have always argued that Cablevision is directly liable under § 106. To elaborate that argument, Petitioners may refer to the entire language of the section. Cablevision's further argument that "to authorize" pertains *solely* to secondary liability is contrary to *Tasini*, 533 U.S. at 498.

progeny decided only that temporary reproductions in computer memory *may* be "fixed." Opp. 25-26. But the Ninth Circuit adopted and applied a test for *when* such reproductions are fixed: a copy is fixed if it is embodied in computer memory long enough to be perceived, reproduced or otherwise communicated. *MAI Sys. Corp. v Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993). Because Cablevision's buffer copies meet that test, the conflict is clear.[4]

Cablevision also suggests that the Copyright Office has welcomed the Second Circuit's reading. But the cited rulemaking criticizes the decision's reasoning and its failure to offer any "guidance as to when a copy might be considered to be 'embodied' for 'a period of more than transitory duration.'" *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 66,173, 66,177 (Nov. 7, 2008).

On the merits, Cablevision incorrectly argues that the functional standard employed by *MAI* and the Copyright Office reads the words "for a period of more than transitory duration" out of the statute. In fact, by recognizing that "to be perceived, reproduced or otherwise communicated for a period of more than transitory duration" applies to the work, not its embodiment, the majority test gives meaning to

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[4] Contrary to Cablevision's mischaracterization (Opp. 24-25), Petitioners' argument is not that a 1.2-second buffer satisfies the Second Circuit's separate durational requirement, but that it meets the *MAI* test – which is undisputed. *See* Pet. 31-32; Pet. App. 16a-17a.

every word in the statute, while adhering to basic grammar. *See Recent Developments* 9; H.R. Rep. No. 94-1476, at 53 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

As Cablevision acknowledges, buffer copies are used in a wide range of digital services and devices. Opp. 5, 22. Thus, whatever the right reading of the statute, there is an acute need for a uniform national rule concerning the scope of the exclusive right to make "fixed" temporary copies in computer memory.

III. The Second Circuit Drastically Narrowed the Public Performance Right.

Cablevision's attempt to defend the Second Circuit's convoluted interpretation of the public performance right is also unavailing. As Cablevision concedes, the decision rests on the far-reaching rationale that a public performance occurs only if the public at-large is the "potential audience" of each *transmission* of a work's performance. Opp. 27; Pet. App. 30a.

Under that impractical and unprecedented reading, *every* commercial on-demand performance would be insulated from *all* copyright liability, both direct and indirect, on the theory that the performance is private, not public. And even when limited to services that use separate copies to generate each transmission, the combination of the Second Circuit's reproduction and public performance holdings will enable unlicensed automated services to provide copyrighted works on demand as long as they follow Cablevision's "copy-then-transmit" business model. Pet. 36-38.

Like the Second Circuit, Cablevision erases the distinction between the work's performance and a transmission of that performance, arguing that each transmission must be "generally available" to the public. Opp. 27-28. But the Act provides that the work's *performance* – not its transmission – must be communicated to the public, which may receive it at different times. 17 U.S.C. § 101. It thereby recognizes that the performance of a work may be communicated to the public via multiple transmissions, each of which is available only to the single member of the public who requested it. Likewise, the Act's treatment of on-demand performances of sound recordings demonstrates that transmissions available to only one person may be "public" – a point Cablevision ignores. *See* Pet. 34 n.7; Sony BMG Amicus Br. 14-20.

The Second Circuit's "parsing of the text of the Copyright Act is peculiar if not perverse," "confuse[s] 'performance' and 'transmission,'" "reads non simultaneous receipt out of the statute," and has "bizarre consequences." *Recent Developments* 26-27. It also conflicts with cases holding that a transmission receivable by only one or a few persons is "public." *E.g.*, *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984). Like the Second Circuit, Cablevision tries to distinguish these prior cases as involving multiple transmissions generated from a single copy. But regardless of that distinction, each *transmission* in these cases was available only to one or a couple persons and no one else. Therefore, under the interpretation defended by Cablevision, the

performances in *Redd Horne* would not be public. *E.g.*, Opp. 26 ("there still is no public performance unless *the transmission* is 'to the public'") (emphasis changed).[5]

To be sure, Cablevision, like the Second Circuit, is quick to restrict the holding below to services that use separate copies to generate transmissions to different viewers. But that limitation cannot be squared with the court's statutory reading, which focuses on the potential audience of a transmission – an inquiry that in no way depends on whether one, many, or (for a live broadcast) no copies are used to generate it. Cablevision also tacitly acknowledges that the multiple copies serve no technological function. The sole reason Cablevision makes multiple copies is – ironically – to evade the requirement for a license. Congress prohibited just such manipulations by providing that public performances can be accomplished "by means of any device or process." 17 U.S.C. § 101.

This Court has never interpreted the public performance provisions of the 1976 Act, which were adopted in large part to make clear that cable transmissions are public performances requiring licenses. *See* Pet. 38-39; MLB Amicus Br. 4-16. The Second Circuit's radical constriction of those

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[5] Cablevision's attempt to explain how the Second Circuit's reading of the transmit clause would cover VOD services (Opp. 27-28) suffers from the same fatal defect. A VOD transmission is available only to the person who requests it, which would make it non-"public" under Cablevision's reading.

provisions as they apply to on-demand performances (over cable, the Internet, or elsewhere), combined with the other serious errors and conflicts of authority in the decision below, create a compelling need for the Court to address these issues now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 08-448

In the Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL., PETITIONERS

v.

CSC HOLDINGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

A copyright holder has the exclusive rights "to reproduce the copyrighted work in copies" and, in the case of audiovisual works and other specified classes of works, "to perform the copyrighted work publicly." 17 U.S.C. 106(1) and 106(4). Respondents intend to offer a remote-storage digital video recorder (RS-DVR) service that would allow subscribers to record television programs when they air and watch the programs at a later time. The questions presented are as follows:

1. Whether respondents would directly infringe petitioners' reproduction rights when the RS-DVR system makes copies of programs and stores those copies on computer hard drives located at facilities owned by respondents.

2. Whether respondents would directly infringe petitioners' reproduction rights when the RS-DVR system, as part of its normal operations, temporarily stores in data buffers small portions of all programs that respondents broadcast.

3. Whether respondents would directly infringe petitioners' public-performance rights when the RS-DVR system transmits previously recorded programs to a subscriber at the subscriber's request.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondents operate cable television systems. Petitioners own the copyrights to numerous programs, which they provide to respondents for broadcast pursuant to various licensing arrangements. Pet. App. 2a.

In March 2006, respondents announced plans to offer a service called a remote-storage digital video recorder (RS-DVR). In May 2006, petitioners filed suit against respondents in federal district court, alleging that the proposed RS-DVR service would infringe petitioners' copyrights. Less than a month later, the parties stipulated that petitioners would assert only claims of direct

(rather than secondary) liability, and that respondents would not assert any fair-use defense. Pet. App. 3a, 44a, 60a-61a.

2. The district court granted summary judgment to petitioners, concluding that respondents would violate petitioners' copyrights at three points during the operation of the RS-DVR system. Pet. App. 43a-80a.

a. The district court held that the creation and storage of recorded programs on computer hard drives located at facilities owned by respondents would violate petitioners' exclusive right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. 106(1). The parties "agree[d]" that the critical question was "*who*" should be deemed to "make" those copies. Pet. App. 64a. The district court concluded that respondents would be "doing the copying" because the RS-DVR would be a "service" rather than a "stand-alone" piece of equipment. *Id.* at 66a-68a. The court emphasized that respondents would have "ongoing participation * * * in the recording process," *id.* at 67a, and "unfettered discretion in selecting the programming that [they] would make available for recording through the RS-DVR," *id.* at 71a.

b. Petitioners' second claim involves data buffering. Cable systems aggregate feeds from various content providers and send the aggregated data stream to subscribers. To operate the RS-DVR, respondents would split the aggregated data stream into two identical streams and send one stream to the RS-DVR system, which would perform a series of digital operations. At several points, the RS-DVR system would temporarily hold snippets of programming data in a series of data buffers. No data would be held in any buffer for longer than 1.2 seconds, and existing data would be erased and

overwritten when new data entered the buffer. Pet. App. 5a, 54a.

The district court concluded that the key question was whether the buffered data would be "fixed." Pet. App. 72a-74a. The Copyright Act defines "copies" as "material objects * * * in which a work is fixed," and it states that "[a] work is 'fixed' * * * when its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. 101. The district court concluded that the buffered data would satisfy that definition because those data would be used to "make permanent copies of entire programs" and therefore would be "capable of being reproduced." Pet. App. 73a.

c. The district court also held that the transmission of previously recorded programs from respondents' hard drives to a subscriber's television would constitute an unauthorized public performance of petitioners' copyrighted works. Pet. App. 75a-80a. The Copyright Act states that "[t]o perform or display a work 'publicly'" includes "transmit[ting] or otherwise communicat[ing] a performance or display of the work * * * to the public * * * whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. 101(2). In the district court's view, respondents "would transmit the same program to members of the public, who [would] receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback." Pet. App. 77a.

3. The court of appeals reversed. Pet. App. 1a-42a.

a. The court of appeals held that respondents would not directly infringe petitioners' reproduction rights when the RS-DVR system copies and stores programs at a customer's request. Pet. App. 18a-27a. The court acknowledged that respondents have "design[ed], hous[ed], and maintain[ed] a system that [would] exist[] only to produce a copy," *id.* at 20a, but concluded "that an RS-DVR customer [would not be] sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that [would be] made automatically upon that customer's command," *id.* at 21a. The court recognized that respondents would "ha[ve] significant control over the content recorded by [its] customers" on the RS-DVR system, but it observed that such control would be "limited to [determining] the channels of programming available to a customer and not to the [selection of particular] programs." *Id.* at 23a; see *ibid.* (distinguishing video-on-demand service, where respondents "actively select[] and make[] available beforehand the individual programs available for viewing"). The court of appeals concluded that it "need not decide today whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." *Id.* at 26a.

b. The court of appeals held that "the acts of buffering in the operation of the RS-DVR [would] not create copies, as the Copyright Act defines that term."

Pet. App. 18a.[1] The court concluded that the statutory definition of "fixed" "imposes two distinct but related requirements." *Id.* at 11a. The first, which the court of appeals referred to as the "embodiment requirement," is that "the work must be * * * placed in a medium such that it can be perceived, reproduced, etc., from that medium." *Ibid.* The second, which the court referred to as the "duration requirement," is that the work "must remain thus embodied 'for a period of more than transitory duration.'" *Ibid.* (quoting 17 U.S.C. 101).

The court of appeals determined that the buffer data created by the RS-DVR system would satisfy the embodiment requirement but not the duration requirement. Pet. App. 16a-18a. The court noted that, in the RS-DVR system, "[n]o bit of data [would] remain[] in any buffer for more than a fleeting 1.2 seconds," and that "each bit of data [would be] rapidly and automatically overwritten as soon as it [was] processed." *Id.* at 17a. The court stated that the inquiry was "necessarily fact-specific," and that "other factors not present here may alter the duration analysis significantly." *Ibid.*

c. The court of appeals held that the transmission of a previously recorded program to a subscriber at the subscriber's request would not infringe petitioners' public-performance rights. Pet. App. 27a-42a.[2] The court construed the Copyright Act to require an "examin[ation of] who precisely is 'capable of receiving' a particular transmission of a performance." *Id.* at 30a. It agreed with respondents that "because each RS-DVR

[1] Given that holding, the court of appeals concluded that it was "unnecessary * * * to determine whether any copies produced by buffering data would be de minimis." Pet. App. 18a.

[2] The court assumed for purposes of its decision that respondents would "make[]" the relevant transmissions. Pet. App. 28a.

transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS-DVR transmission." *Id.* at 30a-31a; accord *id.* at 36a, 39a, 41a.

DISCUSSION

Network-based technologies for copying and replaying television programming raise potentially significant questions, but this case does not provide a suitable occasion for this Court to address them. The Second Circuit is the first appellate court to consider the copyright implications of network-based analogues to VCRs and set-top DVRs, and its decision does not conflict with any decision of this Court or another court of appeals. The parties' stipulations, moreover, have removed two critical issues—contributory infringement and fair use—from this case. That artificial truncation of the possible grounds for decision would make this case an unsuitable vehicle for clarifying the proper application of copyright principles to technologies like the one at issue here.

From the consumer's perspective, respondents' RS-DVR service would offer essentially the same functionality as a VCR or a set-top DVR. And although scattered language in the Second Circuit's decision could be read to endorse overly broad, and incorrect, propositions about the Copyright Act, the court of appeals was careful to tie its actual holdings to the facts of this case. The petition for a writ of certiorari therefore should be denied.

A. This Case Does Not Satisfy The Court's Traditional Criteria For Granting A Writ Of Certiorari

1. The Second Circuit's decision does not conflict with any decision of this Court or another court of appeals

a. The Second Circuit is the first appellate court to address the copyright implications of the shift from a set-top-based to a network-based system of enabling consumers to record and play back television programs of their own choosing. The decisions on which petitioners rely addressed different technologies and arose in different factual contexts. As a result, there is no conflict between the outcome of this case and any previous decision.

The Second Circuit's decision, however, is unlikely to be the last appellate ruling to address these issues. Other cable providers may initiate services that are similar to respondents' RS-DVR. Analogous issues also may arise with respect to other network-based services for copying and playing back copyrighted works.[3] Deferring review of the legal issues raised by various network-based playback technologies would allow those issues to be more fully explored by litigants and the lower courts. This Court would then be in a better position to address the legal significance, if any, of the differences between various technologies and services.

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[3] One example may be music lockering services, which permit users to upload files to a remote computer server and stream that music to a personal device over the Internet. The general development of cloud computing, which is an umbrella term for services where programs or files are stored remotely and accessed via the Internet or other means, may generate similar issues.

b. None of the Second Circuit's specific holdings in this case conflicts with any holding of this Court or another court of appeals.

i. The Second Circuit held that, "on the facts of this case, copies produced by the RS-DVR system [would be] 'made' by the RS-DVR customer, and [respondents'] contribution to this reproduction * * * [would] not warrant the imposition of direct liability." Pet. App. 26a-27a. Petitioners acknowledge that the court of appeals' analysis of this issue is consistent with *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and *CoStar Group, Inc.* v. *Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004), and they do not assert that it conflicts with any published decision of another court of appeals.[4]

Contrary to petitioners' contention (Pet. 15, 21-22, 25, 28), the Second Circuit's decision in this case does not conflict with *New York Times Co.* v. *Tasini*, 533 U.S. 483 (2001). As framed by the parties, the critical issue here is "*who*" would "make" the copies that would be stored on the RS-DVR system. Pet. App. 64a; accord *id.* at 19a. No similar question was presented in *Tasini*.

The Court in *Tasini* construed 17 U.S.C. 201(c), which authorizes publishers of collective works, in certain specified circumstances, to reproduce and distribute articles written by freelance authors. The Court held

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[4] Petitioners' reliance (Pet. 28-29) on the Fifth Circuit's unpublished decision in *Playboy Enterprises, Inc.* v. *Webbworld*, No. 98-10097, 1999 WL 25053 (Jan. 8, 1999) (per curiam), is misplaced. Even a genuine conflict between a published decision and an unpublished decision would not warrant this Court's review. In any event, because the Fifth Circuit's decision in *Webbworld* states, in its entirety, "[w]e affirm essentially for the reasons stated by the trial judge," *id.* at *1, it is impossible to identify the precise basis for the Fifth Circuit's decision.

that Section 201(c) did not apply to the creation of copies of individual articles for inclusion in certain databases and the distribution of those copies to database users. *Tasini*, 533 U.S. at 488. As petitioners point out (Pet. 21-22), this Court rejected the argument that, under *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), the publishers "could be liable only under a theory of contributory infringement." *Tasini*, 533 U.S. at 504. But the premise of the Court's analysis was that the publishers had made copies of the articles that they were selling. See *id.* at 491 (stating that copies were made "when, as permitted and facilitated by the Print Publishers, [the Electronic Publishers] placed the Articles in [certain] databases"); *id.* at 504 ("it is the copies themselves, without any manipulation by users, that fall outside the scope of the § 201(c) privilege"). By contrast, in this case, "who makes the copies?" is the fundamental question.

ii. The Second Circuit's rejection of petitioners' buffering claim does not conflict with *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). The court of appeals distinguished, rather than disagreed with, the decision in *MAI Systems*. As it explained (Pet. App. 12a-13a), *MAI Systems* involved the loading of software into a computer's random access memory so that the defendant's employee could service the computer. Recognizing that the courts in *MAI Systems* and its progeny had not analyzed the statute's "transitory duration" language or considered whether that language imposes a separate "duration requirement" (in addition to an "embodiment requirement") the Second Circuit reasonably declined to read those decisions as holding

sub silentio that no such requirement exists. *Id.* at 12a.[5] The Second Circuit's conclusion that the duration requirement that it found in the statute probably would have been satisfied in *MAI Systems*, see *id.* at 13a, 17a, further underscores the lack of any conflict. Finally, the Second Circuit noted that "unlike the data in cases like *MAI Systems*, which remained embodied in the computer's RAM memory until the user turned the computer off," the buffered data in respondents' RS-DVR system would be "rapidly and automatically overwritten as soon as it [was] processed." *Id.* at 17a.

iii. Petitioners are also wrong in asserting (Pet. 34-36) that the Second Circuit's public-performance holding conflicts with decisions addressing situations in which an alleged infringer acquired individual copies of a work and made the same copies available to members of the public. See *Columbia Pictures Indus., Inc.* v. *Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279 (9th Cir. 1989); *Columbia Pictures Indus., Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 157 (3d Cir. 1984); *Video Pipeline, Inc.* v. *Buena Vista Home Enter., Inc.*, 192 F. Supp. 2d 321, 328 (D.N.J. 2002), aff'd, 342 F.3d 191 (3d Cir. 2003), cert. denied, 540 U.S. 1178 (2004); *On Command Video Corp.* v. *Columbia Pictures Indus.*, 777 F. Supp. 787, 788 (N.D. Cal. 1991). The Second Circuit stated repeatedly that its public-performance holding

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[5] Although it referred to "*MAI Systems* and its progeny," Pet. App. 12a-13a, the Second Circuit did not specifically discuss *Storage Technology Corp.* v. *Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005), or *Stenograph L.L.C.* v. *Bossard Associates, Inc.*, 144 F.3d 96 (D.C. Cir. 1998). Like *MAI Systems*, however, those decisions involved the loading of software from a computer's hard drive into random access memory and neither specifically addressed the meaning of the "transitory duration" language in 17 U.S.C. 101.

turned on three critical facts, *i.e.*, that "each RS-DVR playback transmission is made [1] to a single subscriber [2] using a single unique copy [3] produced by that subscriber." Pet. App. 41a; accord *id.* at 30a-31a, 36a, 39a. The court of appeals specifically distinguished *Redd Horne* and *On Command* on the ground that those cases involved "successive transmissions to different viewers * * * using a single copy of a given work." *Id.* at 40a.

2. The parties' stipulations would make this case an unsuitable vehicle for examining the issues raised by network-based recording and playback systems

Petitioners argue that the Court should use this case to "set a standard for copyright protection in the marketplace of automated access to and delivery of copyrighted works." Pet. 23. This case, however, presents an unsuitable vehicle for clarifying the applicable legal framework because the parties' agreement not to litigate two critical issues—secondary liability and fair use—distorts the questions that remain and would prevent the Court from seeing whole the fundamental controversy in this case.

a. Less than a month into this litigation, the parties stipulated that petitioners would not pursue any claims based on principles of secondary liability, and that respondents would not raise any fair-use defense. Pet. App. 61a. As a result, neither the district court nor the court of appeals addressed those issues, and this Court would have no opportunity to consider them if it granted review. This case therefore presents no opportunity for the Court to "have the final say" (Pet. 23) even as to the legality of the particular (and currently unique) RS-DVR service that respondents seek to offer.

b. The parties' stipulation also exaggerates the significance of the issues that remain. For example, the Second Circuit's holding that subscribers rather than respondents would "make[] the copies" in the RS-DVR system (Pet. App. 8a; see *id.* at 22a-24a) does not purport fully to establish respondents' liability under the Copyright Act. Instead, it sets only the internal boundary line between direct liability and various kinds of secondary liability. *Id.* at 24a ("Most of the facts found dispositive by the district court * * * seem to us more relevant to the question of contributory liability."). This Court has stated that "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn," *Sony*, 464 U.S. at 435 n.17 (citation omitted). The precise location of those lines has assumed dispositive significance here only because petitioners agreed not to pursue secondary-liability claims. Cf. Pet. App. 24a ("to the extent that we may construe the boundaries of direct liability more narrowly, the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works"). In a more usual copyright suit, a court would have the opportunity to review a range of liability claims, each of which potentially would provide some perspective on the others. The parties' stipulation prevents that from happening here.

Respondents' failure to preserve any fair-use defense likewise would hinder this Court's ability to consider the various issues raised by services like the RS-DVR. This Court ruled in *Sony* that the manufacturer and seller of VCRs could not be held liable for copyright infringement because "time-shifting" by consumers constituted a fair use of copyrighted broadcasts. 464 U.S. at 447-456. This Court has never addressed, however, whether

a commercial actor who is charged with direct infringement may defend on the ground that he performed the copying at the behest of a customer who himself would have a fair-use defense.[6] Because of respondents' agreement not to assert a fair-use defense in this case, the question whether respondents or their customers would "make" the non-transient copies in the RS-DVR system has assumed great significance. The importance of that issue would be diminished if not eliminated, however, if commercial actors who make copies to facilitate their customers' time-shifting were held to be entitled to their customers' fair-use defense.

The parties' agreement not to litigate fair-use issues also affects the analysis of petitioners' buffering claim. If the creation and storage of non-transient copies on the RS-DVR system's hard drives were determined not to violate petitioners' exclusive rights under the Copyright Act—either because such copies were deemed to have been made by consumers and would be a fair use similar to the use found to be fair under *Sony*, or because a third party is entitled to a fair-use defense when it makes copies on behalf of a consumer whose own copying would be a fair use—then too the ancillary creation of transient "buffer" copies arguably would be a fair use as well. And if that were the case, the question whether

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[6] Petitioners cite (Pet. 20-21) *Princeton University Press* v. *Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 520 U.S. 1156 (1997), as evidence that it is "well-settled" that commercial copiers cannot invoke their customers' fair-use defense. The 6-5 division in that case, however, indicates that the issue is susceptible to legitimate disagreement. Compare *id.* at 1389, with *id.* at 1393-1394 (Martin, C.J., dissenting), *id.* at 1395 (Merritt, J., joined by Daughtry, J., and Moore, J., dissenting), and *id.* at 1401 (Ryan, J., joined by Daughtry, J., dissenting).

the buffered data in the RS-DVR system would be "fixed" would lose most if not all significance.

Finally, respondents' waiver of any fair-use defense affects petitioners' public-performance claim. When a subscriber engages in time shifting, recording the program and playing it back are two sides of the same coin. If fair-use principles would excuse a cable company from liability for unauthorized reproduction when an RS-DVR system copies and stores a program on a hard disk at a subscriber's behest, the same principles might excuse the company from liability for unauthorized public performance when the system transmits the program to the subscriber for playback. Here too, the parties' agreement to litigate the case without reference to fair-use principles has elevated to great importance a question that otherwise might have been insignificant.[7]

B. On The Merits, The Second Circuit Reasonably And Narrowly Resolved The Issues That Were Presented To It

1. For the last 30 years, consumers have been able to record televised programs and to play back the recorded programming at a later time. Respondents' proposed RS-DVR service is part of a broader transition from analog to digital recording and playback, and from business models where consumers purchase a tangible item to those where they pay for a service.

The first commercially available system for consumer-driven recording and playback was the VCR, which was introduced during the 1970s and recorded programs on magnetic tape cassettes. In *Sony*, *supra*,

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[7] The significance of the Second Circuit's public-performance ruling also would be diminished if the subscriber were deemed to be the one "performing" the work—an argument that respondents raised but the court of appeals did not reach. Pet. App. 28a.

copyright holders sued a VCR manufacturer, asserting that its customers were engaged in copyright infringement and that the manufacturer was secondarily liable because it had sold the devices that performed the copying. This Court rejected the claim. The Court held that the manufacturer of a staple article of commerce is not a contributory infringer if its product is "capable of commercially significant noninfringing uses," *Sony*, 464 U.S. at 442, and that VCRs had several commercially significant noninfringing uses, including consumer "time-shifting," *id.* at 447-456. See *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 931-935 (2005) (elaborating on *Sony*'s contributory-infringement reasoning).

Since *Sony* was decided, the VCR has gradually given way to digital video recorders (DVRs), which record programming on hard drives in a digital format. The first DVRs were sold directly to consumers, and consumers may still purchase set-top DVRs from companies like TiVo and Phillips. In addition, many cable and satellite companies—including respondents—now lease devices that combine the functionality of a cable box and a set-top DVR, and the vast majority of DVRs are now leased rather than purchased. By 2007, there were approximately 26 million DVRs in the United States, and some experts estimate that 50% of United States households will have DVRs by 2010. *Cable Passes Satellite In DVR*, Wireless Satellite and Broadcasting Newsletter, July 1, 2007, available in 2007 WLNR 16058889.[8]

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[8] Petitioners emphasize (Pet. 20, 25) that, unlike the VCR manufacturer at issue in *Sony*, respondents not only provide the equipment that would be used to make copies through the RS-DVR service, but also select the content that would be available for copying. The same is true, however, when a cable company leases a set-top DVR to its subscriber.

2. In addition to leasing equipment that allows consumers to record television programming as it airs for later viewing, many cable companies—including respondents—also provide programming to subscribers through video-on-demand (VOD) systems. In a VOD system, a cable company stores a selection of programs at its headquarters and makes those programs available to most or all of its subscribers. A subscriber navigates an on-screen menu using a remote control and selects a program, which is transmitted to the subscriber's television over the company's cable network. Unlike with a VCR or set-top DVR, a customer who uses a VOD service need not previously have recorded the program in question, and he may be able to view programs that either never aired at all or would not have been available as part of the subscriber's cable package. Pet. App. 6a, 49a.

The disagreement between the district court and the court of appeals in this case turned in large measure on whether respondents' RS-DVR service is more closely analogous to a set-top DVR or to a VOD service. Compare Pet. App. 21a, 23a, with *id.* at 68a-69a. Respondents prefer the former analogy given that petitioners have never alleged that respondents and similar companies are violating the Copyright Act by leasing set-top DVRs to their subscribers.[9] Petitioners insist on the

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In addition, as the court of appeals pointed out, although respondents determine "the channels of programming available to a customer," they have "no control over what programs are made available on individual channels or when those programs will air." Pet. App. 23a.

[9] An argument could be made that *Sony*'s holding should be limited to cases where a defendant engages in a one-time sale and has no ongoing relationship with its customers or continuing control over the device at issue. Petitioners have litigated this suit, however, on the implicit as-

latter, VOD service analogy for converse reasons: Respondents have negotiated licenses with petitioners for the VOD services that they currently offer, see *id.* at 49a, and respondents do not suggest that they could continue offering VOD services without the licenses.

3. a. The question whether respondents' RS-DVR service would be more analogous to a set-top DVR or to a VOD service is particularly significant with respect to the first question presented. As the parties have framed that issue, the dispositive question is "*who*"—respondents or their subscribers—should be deemed to "make[] the copies" of programs that would be saved on the RS-DVR system's hard drives and available for later playback. Pet. App. 64a; see *id.* at 18a-19a. Petitioners do not dispute that the copies created by a VCR or set-top DVR are "made" by the subscribers, who both select

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sumption that respondents' leasing of set-top DVRs to their subscribers does not violate the copyright laws (cf. note 8, *supra*), and the court of appeals decided the case on that understanding. If the legality of cable operators' leasing of set-top DVRs is thought to be beyond reasonable dispute, the decision whether to analogize the RS-DVR system to those devices or a VOD service takes on particular importance. On the other hand, if the potential Copyright Act challenge to such leasing arrangements is thought to be substantial, petitioners' failure to contest that point would make this case an especially poor vehicle for clarifying the applicable law in this area.

Although DVRs have been sold since 1999, Pet. App. 50a, no federal court has addressed whether the seller or lessor of set-top DVRs may be held liable for copyright infringement. In 2001, copyright holders sued the manufacturer of the RePlayTV DVR. Unlike other DVRs, that device enabled users to skip commercials automatically and send recorded programs to other users. The plaintiffs voluntarily dismissed that suit prior to judgment after the original manufacturer declared bankruptcy and its assets were sold to another company, which discontinued the challenged features. See *Paramount Pictures Corp. v. RePlayTV, Inc.*, 298 F. Supp. 2d 921, 923-924 (C.D. Cal. 2004).

the programs to be recorded and push the buttons that operate those machines. Respondents likewise do not deny that cable providers "make" copies when they provide VOD service.

Accepting the dispute as so framed, the court of appeals reasonably concluded that the subscriber—who would both select the programs to be copied and press the button triggering the actual recording—would "make" the copies that would be stored in the RS-DVR system. Respondents' RS-DVR service would replicate the basic capabilities and limitations of a VCR or a set-top DVR, and it would lack much of the functionality offered by a VOD system. Like a VCR or set-top DVR, the RS-DVR would permit subscribers to view only programs that already have been broadcast and that subscribers could have chosen to view in real time under the terms of their cable packages. Pet. App. 6a, 23a. The RS-DVR also would permit subscribers to view only programs that they personally and previously had directed the system to copy, and it would not allow them to view portions of a program that had aired prior to the subscriber pressing the "record" button. *Id.* at 6a.

To be sure, respondents' RS-DVR service would differ from a set-top DVR in that the tangible devices that would perform the copying and playback would be located in respondents' facilities rather than in a subscriber's home. That shift from local to network-based recording and playback, however, appears largely irrelevant to the determination of who would "make" the copies. With respect to the photocopying of written material, an individual who both selects the pages to be copied and operates the duplicating machine is naturally said to "make" the copies, whether the photocopier is located in the individual's home or at a self-service copy

shop. There is no evident reason for a different result here. See Pet. App. 22a.

Petitioners also overstate the scope of the Second Circuit's holding. The court of appeals announced no "categorical exemption from direct liability" (Pet. 24) for providers of automated services and it did not "assume[]" (Pet. 19 n.4) that only one person can "make" a particular copy. To the contrary, the Second Circuit expressly limited its decision to "the facts of this case" (Pet. App. 26a), and it appears to have assumed that more than one party *can* potentially be held liable as a direct infringer with respect to a single copy. See *id.* at 26a-27a ("copies produced by the RS-DVR customer [would be] 'made' by the RS-DVR customer, *and* [respondents'] contribution to this reproduction by providing the system does not warrant the imposition of direct liability") (emphasis added).[10] The Second Circuit simply resolved a narrow question about a discrete technology in the terms that it had been framed by the parties.

b. The Second Circuit's buffering holding was similarly, and appropriately, limited. The court of appeals observed that, in respondents' RS-DVR system, "[n]o bit of data [would] remain[] in any buffer for more than a fleeting 1.2 seconds." Pet. App. 17a. The court found it "fair to assume that," in *MAI Systems*, "the [relevant] program was embodied in the RAM for at least several minutes." *Id.* at 13a. But the court of appeals did not

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[10] For example, if one person selects the programs or documents to be copied, but hires someone else to push the buttons used to operate the relevant copying machine, it is possible that both could be held liable as direct infringers for any copyright violations that their conduct entails. Under respondents' proposed RS-DVR system, however, subscribers would perform both aspects of the copying.

adopt any categorical rule that an embodiment period of "1.2 seconds" is always too short, or that a period of "several minutes" is always long enough, to render a particular copy "fixed" under 17 U.S.C. 101. To the contrary, the court emphasized that the proper inquiry "is necessarily fact-specific" and that "other factors not present here may alter the duration analysis significantly." Pet. App. 17a. Such caution was particularly appropriate with respect to buffering data because "[a]ll digital devices"—including set-top DVRs—buffer data as part of their normal operations. *Id.* at 54a.

c. The analogy between respondents' RS-DVR service and a set-top DVR is weakest with respect to the public-performance issue because the operation of the former, unlike the latter, would clearly involve a "transmission." See 17 U.S.C. 101 ("To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."); Br. in Opp. 26-27. Thus, even if the subscriber would "make" the copies used in the RS-DVR system, respondents might still violate the Copyright Act if they "transmitted" those copies "to the public." Some language in the court of appeals' opinion could be read to suggest that a performance is not made available "to the public" unless more than one person is capable of receiving a *particular* transmission. See, *e.g.*, Pet. App. 36a ("under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is 'to the public.'"); *id.* at 41a ("we find that the transmit clause directs us to identify the potential audience of a given transmission"). Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented

here, including with respect to VOD services or situations in which a party streams copyrighted material on an individualized basis over the Internet.

Taken as a whole, however, the court of appeals' analysis of the public-performance issue should not be understood to reach VOD services or other circumstances beyond those presented in this case. The Second Circuit repeatedly explained that its rejection of petitioners' public-performance claim depended on a range of factors: not only that each transmission would be sent to a single recipient, but also that (1) each transmission would be made using a unique copy of the relevant program; and (2) each transmission would be made solely to the person who had previously made that unique copy. See, *e.g.*, Pet. App. 30a-31a, 36a, 39a, 41a. By limiting its holding to circumstances in which those two additional features are present, the Second Circuit sustained the legality of respondents' proposed RS-DVR service without casting doubt on the widespread premise that VOD and similar services involve public performances.

Petitioners also contend (Pet. 37) that, under the court of appeals' decision, respondents could provide VOD services without a license by establishing a system in which the subscriber "will simply send an electronic request first to 'copy' and then to 'play' the desired work." But even assuming that the subscriber in that scenario would be deemed to "make" the copy, the legality of his conduct would be suspect at best, because he would be not simply time-shifting but instead copying programs that he was not otherwise entitled to view. Compare *Sony*, 464 U.S. at 449. And if the subscriber's own copying would violate the Copyright Act, respondents and similar cable providers would be subject to secondary liability for inducing and facilitating that vio-

lation. Cf. *Grokster*, 545 U.S. at 934-937. Indeed, the court of appeals "emphasize[d]" that its decision "does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." Pet. App. 41a-42a. Thus, while some aspects of the Second Circuit's reasoning on the public-performance issue are problematic, the court's ultimate holding is less far-reaching than petitioners suggest and is insufficiently important to warrant this Court's review, especially in a case that does not satisfy the Court's traditional criteria for granting a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC. and
CABLEVISION SYSTEMS CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* BROADCAST MUSIC, INC. AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS IN SUPPORT OF PETITIONERS

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Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") submit this *amicus* brief in support of the Petition for a Writ of Certiorari, dated October 6, 2008 (the "Petition").[1]

INTEREST OF *AMICI CURIAE*

Amici curiae BMI and ASCAP are performing rights societies, expressly referred to as such in the Copyright Act, 17 U.S.C. § 101 (definition of "performing rights society"). ASCAP and BMI represent hundreds of thousands of songwriters, composers, and publishers of copyrighted music. They issue licenses to music users for the public performance of their members' and affiliates' musical works, collect license fees from the music users, and distribute those fees as royalties to their members and affiliates whose works have been performed on media such as television, radio, and the Internet. BMI and ASCAP each license the right of public performance in millions of musical works. Their affiliates and members, taken together, comprise almost all American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, ASCAP and BMI also

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief.

represent, in the United States, virtually all of the rest of the world's writers and publishers of music.

BMI's and ASCAP's licensing activities are governed by Consent Decrees that were entered into and are administered by the United States Department of Justice (the "Consent Decrees").[2] The Consent Decrees provide, among other things, that music users receive blanket licenses upon request, with rates and terms set by the United States District Court for the Southern District of New York in the absence of agreement.

ASCAP and BMI licensees include thousands of local television and radio stations, virtually all broadcast and cable/satellite television networks, on-demand programming packagers, cable system operators and direct broadcast satellite services, Internet service providers, thousands of websites, and tens of thousands of restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, and other businesses throughout the United States that perform music publicly. BMI's and ASCAP's repertoire-wide blanket licenses provide music users with efficient access to public performing rights for the quantity and variety of music the public demands. The crucial role of ASCAP and BMI in giving practical effect to the performing

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2. BMI's current Consent Decree was entered in 1966, and amended in 1994. *United States v. Broad. Music, Inc.*, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), *amended by* 1996-1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994). ASCAP's governing Consent Decree is the Second Amended Final Judgment, entered June 11, 2001 in *United States v. American Society of Composers, Authors & Publishers*, 2001-2 Trade Cases (CCH) ¶ 73,474 (S.D.N.Y. 2001).

rights granted by Congress to the creators of music in section 106(4) of the Copyright Act is described in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Importantly, performing rights royalties constitute the largest single source of income for many composers, lyricists, songwriters, and music publishers. Most of these royalties come from broadcast and cable television and radio, and an increasing share comes from the Internet. In total, BMI and ASCAP together collect nearly two billion dollars in royalties per year. The Second Circuit's decision places a substantial part of this livelihood in serious jeopardy. By its erroneous narrowing of the exclusive right to make performances "to the public" granted to songwriters by Congress, the Second Circuit has provided a roadmap for companies to avoid paying for many of their transmissions of music to their customers. Not only could the decision destabilize longstanding markets that currently provide income to songwriters, it also threatens income derived from rapidly evolving Internet-based and other on-demand markets. The right of public performance at issue in this matter is of vital concern to the music creators whom BMI and ASCAP represent.

SUMMARY OF ARGUMENT

As performing rights societies, ASCAP and BMI "license[ ] the public performance of nondramatic musical works on behalf of copyright owners." 17 U.S.C. § 101. If the Second Circuit's erroneous interpretation of the public performing right stands, this task could become exponentially more difficult, especially in valuable emerging markets for digital and on-demand music. The Second Circuit's interpretation posits that a service can create copies of works at the request of its customers and then utilize those copies to transmit performances of those works to the customers on-demand without engaging in a public performance under 17 U.S.C. § 106(4). This narrow and unprecedented view of one of the broadest and most fundamental exclusive rights granted by Congress to songwriters and composers creates the opportunity for businesses to provide performances of copyrighted music to their customers, for a fee, without paying royalties to those who created it. The loophole created by the ruling is therefore particularly detrimental to *amici's* affiliates and members, whose livelihoods often depend on public performance royalties.

Moreover, should the decision stand, BMI and ASCAP, and their affiliates and members, could suffer unique harm because disputes regarding ASCAP's and BMI's public performance licenses, pursuant to the Consent Decrees, proceed before rate courts set in the United States District Court for the Southern District of New York. This outsized potential impact of the decision below on the hundreds of thousands of composers, songwriters, and music publishers represented by *amici* weighs strongly in favor of review.

Finally, the Second Circuit's decision contains clear errors in its interpretation of the Copyright Act. The unauthorized conduct that the Court's decision encourages is proscribed by the plain language of the Copyright Act. The exclusive right of public performance, unlike other rights such as reproduction or distribution, bears no relation to the presence, number, or source of copies used. The text and legislative history of the statute specifically describe a broad right to publicly perform music, regardless of the technology employed to do so. Indeed, the decision below conflicts with the rulings of other circuits, and raises serious questions about United States compliance with international treaty obligations.

In view of the foregoing, this Court should grant the Petition to correct the errors made below.

ARGUMENT

I. ALLOWING THE SECOND CIRCUIT DECISION TO STAND WILL CAUSE IMMEDIATE AND SUBSTANTIAL HARM TO SONGWRITERS AND COMPOSERS.

A. The Second Circuit Decision Creates a Loophole That Allows Music Users to Avoid Paying Public Performance License Royalties.

If allowed to stand, the Second Circuit's decision creates a loophole in the copyright law through which all sorts of commercial media companies could seek to avoid paying public performance license fees. Cablevision's remote-storage digital video recorder ("RS-DVR") system allows all subscribing households—potentially millions of viewers—the option (for a fee) to view televised programs at a time of their choosing, without the permission of the copyright owners, whether or not they have viewed the program when it was initially shown.[3] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124-25 (2d Cir. 2008). Whenever customers select a particular program for potential later viewing, additional copies of the original program are made by the RS-DVR system. The customers then notify Cablevision when they wish to view the program, and the pre-recorded copies of the program

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3. As of December 31, 2007, Cablevision had approximately 3.1 million basic video subscribers in and around the New York City metropolitan area. Cablevision Systems Corp., Annual Report (Form 10-K), at 1 (Feb. 28, 2008).

are then transmitted to the subscribers by Cablevision. Based on engineering choices made by Cablevision in designing the system, the Second Circuit held that, "[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance." *Id.* at 139.

So, for example, an episode of the AMC cable network program *Mad Men* might be transmitted by Cablevision on a given Sunday night at 10 p.m., in its scheduled time slot. If just 1% of Cablevision's subscribers—approximately 30,000 households—elect to use the RS-DVR system to watch the episode at a later time, 30,000 households receive transmissions from Cablevision of that episode that they watch at those later times as the program arrives by cable at their home televisions. According to the Second Circuit, these are 30,000 "private" performances of the same exact episode, all transmitted from Cablevision's central "head-end" by cable to its subscribers' households. And of course, Cablevision can charge its subscribers for the privilege of watching these supposedly "private" performances.

Even if the Second Circuit's "private" performance ruling requires the viewer or listener to "do" the copying to take advantage of the loophole, companies can easily structure their technology so that customers "do" the copying.[4] Under the decision, all that is necessary for the

4. The Second Circuit's ruling expressly does not reach *who*—as between Cablevision and its subscriber—"performs" the copyrighted work when the RS-DVR is employed, resting instead on the conclusion that no public performance occurs. (Cont'd)

home subscriber to "do" the copying is a simple press of a button on the remote control, setting in motion the copying machinery engineered, owned, and maintained by the company on its premises. *Id.* at 131-33. This massive copying can be accomplished at little cost using digital technology. Companies are therefore apparently free to (1) simply structure their technology so that a copy is made remotely each time a viewer or listener electronically requests any kind of program before transmission, and (2) then not pay for the music used in those television programs.

Moreover, some may read the Second Circuit's ruling more broadly to label as "private" *any* transmission of a unique copy of a work to a single user. Under this construction, companies simply need to structure their systems to transmit unique exact copies of each program (or song) for each of their viewers or listeners—an easy and inexpensive endeavor in the current digital age—in order to attempt to avoid paying performance royalties, thereby greatly harming ASCAP's and BMI's members and affiliates.

(Cont'd)

Cartoon Network, 536 F.3d at 134. Paradoxically, however, the Second Circuit appears to hold that who "does" the *copying* matters to whether the *performance* is "to the public," ruling that "[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy *produced by that subscriber*, we conclude that such transmissions are not performances 'to the public' . . . ." *Id.* at 139 (emphasis added). As discussed in part II(A) *infra*, this is a fundamental flaw in the court's reasoning. The reproduction right and the public performing right are separate and distinct rights, and the number or source of copies—if any—used to generate a transmission is irrelevant to the public performing right.

B. The Second Circuit Decision Threatens to Deprive Songwriters of Royalties for a Broad Range of Digital and On-Demand Services.

This case arises in the context of the delivery of broadcast and cable network television programs and films by a cable system operator to home viewers, an arena where BMI and ASCAP are actively engaged in collecting public performance royalties.[5] After the advent of digital broadcasting, ASCAP and BMI have offered licenses that include—for a fee—the right to make digital transmissions (including on-demand transmissions) of the music in scheduled programming, on dedicated high definition television channels, stations' websites, network-owned websites, and on various third party websites.

Increasing amounts of revenue are derived from *amici's* licenses to Internet sites and services for the digital transmission of music to the public. With improved technology, the digital transmission of music has become faster and more commonplace, increasingly replacing traditional analog broadcast modes of content delivery and sales of physical copies. There has been "a sharp shift in entertainment viewing that was thought

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5. *Amici* license cable and broadcast networks for their full schedule of programming, with the licenses covering transmissions "through to the viewer"—that is, both the satellite transmissions from the cable network to the cable systems' head-ends, and the near-simultaneous transmissions by cable systems such as Cablevision to subscribers. *Amici* also separately license the cable system operators for non-network programming that the operators originate, such as local news or public access programs.

to be years away: watching television episodes on a computer screen is now a common activity for millions of consumers." Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1. Already there are times when more viewers may see a network-originated program via on-demand transmissions from an authorized website than on the broadcast network itself. For example, some recent *Saturday Night Live* political sketches were viewed more times online than on the NBC television broadcasts. Brian Stelter, *Web Site's Formula for Success: TV Content With Fewer Ads*, N.Y. TIMES, Oct. 29, 2008, at B10.

The popularity of on-demand services continues to grow. The day when everyone watched or listened to the same program at the same time—scheduled television and radio—is fading. Traditional "linear" radio and television programming is increasingly being replaced, especially for young people, with on-demand entertainment that never appears in a scheduled time slot. These are point-to-point electronic transmissions from a cable system, an Internet site, or a mobile entertainment provider via a cell phone or other wireless device to the individual customer. For example, millions of customers now access streamed performances of audiovisual works (including music videos) and music on-demand from their computers and mobile entertainment devices through a variety of services such as Rhapsody, LaLa, and Napster, generating steadily growing revenues through licensed use of copyrighted content. Cablevision already participates in this dramatic shift. At the end of 2007, Cablevision had 2.6 million subscribers to iO TV, its digital video service that includes "access to hundreds of titles each month on

demand, featuring hundreds of movies, and subscription video on demand programming . . . ." Cablevision Systems Corp., Annual Report (Form 10-K), at 4 (Feb. 28, 2008). As of now, *amici* license on-demand services, which in turn provide on-demand programming to cable system operators. The Second Circuit decision has placed those fees in jeopardy.

These digital and on-demand markets provide a significant source of revenue for American songwriters, composers, and music publishers. The Second Circuit decision creates an easily exploited loophole that threatens this revenue, on which so many music creators depend, and it therefore warrants review by this Court.

C. Because of the Rate Court System Which Governs ASCAP and BMI, Music Creators May Be Particularly Harmed by the Decision Below.

BMI and ASCAP, and the music composers for whom they administer the public performing right, risk being uniquely harmed if the decision below stands. The Second Circuit's constriction of the public performing right will have repercussions in a broad range of licensing negotiations. In the case of BMI and ASCAP, these negotiations are not purely private, but concern rates that are ultimately subject to supervision by the rate courts—located in the Southern District of New York.[6] A provider that rigs its service to follow the route mapped by Cablevision around the perimeter of the public performing right, and then rejects the scope and

6. *See supra* note 2 and accompanying text.

terms of the licenses offered by ASCAP and BMI, always has the option of bringing its case before the rate courts, both of which are located within the Second Circuit. Under the Consent Decrees, the rate courts determine whether a particular use of music involves the exercise of the public performing right. If the answer is negative, the use may be categorically excluded from the calculus in determining the court-ordered license rate for a service that includes that use. *See, e.g., United States v. Am. Soc'y of Composers, Authors & Publishers (In re America Online Inc., RealNetworks Inc. & Yahoo! Inc.)*, 562 F. Supp. 2d 413, 494 (S.D.N.Y. 2008) (analyzing whether portion of RealNetworks' service required licenses).

Thus, for *amici*, the decision below is not simply an erroneous statutory interpretation by one of thirteen Courts of Appeals. For the public performing right in music, the Second Circuit, in practice, assumes a status of first among equals because it is the only court to which appeals from decisions of the rate courts may be brought. Its precedents not only govern the adjudication of routine infringement cases that arise within its geographic jurisdiction; they also potentially control the resolution of every dispute, no matter where it arises, involving the ASCAP and BMI licenses pertaining to the public performing right in the millions of compositions administered by BMI and ASCAP. *Amici* submit that these unique circumstances counsel strongly for the grant of the Petition.

II. THE SECOND CIRCUIT DECISION IS CLEARLY INCONSISTENT WITH THE BROAD EXCLUSIVE RIGHT OF PUBLIC PERFORMANCE DESCRIBED IN THE TEXT AND THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT.

In the 1976 Copyright Act, Congress granted copyright owners a broad public performing right. Its goal was to enable creators—including music composers—to exploit their works by any technological means then existing or later developed. Congress recognized that it could not predict what forms the new means of dissemination would take, and thus encompassed all of them within the scope of the public performing right. The decision below would confine this intentionally broad right within a technological straitjacket and tether its applicability to the number of copies associated with the transmissions in question, a factor that has heretofore been completely irrelevant to the scope of the right. Granting the Petition would enable this Court to examine the contours of the public performing right for the first time since enactment of the 1976 Act, to correct the misreading of the statute by the court below, and to ensure that the interests of music creators are not left behind in the headlong rush of new technologies for disseminating musical works to the public.

A. The Second Circuit Misinterpreted the Statute.

The Copyright Act grants the owner of a copyright an exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). The definitions of the key terms "perform" and "publicly" are expansive and must be given full force because Congress intended to "set forth the copyright owner's exclusive rights in *broad* terms." H.R. REP. NO. 94-1476, at 61 (1976) (emphasis added); S. REP. NO. 94-473, at 57 (1975) (same). Instead of doing so, the court below myopically scrutinized a few words in the definition of "publicly," and consequently reached a result wholly inconsistent with the stated intent of Congress and the plain language Congress employed to carry out that intent.

In deciding whether Cablevision's RS-DVR service implicated the public performing right, the court below correctly focused on the "transmit clause"—the second prong of the definition set forth in 17 U.S.C. § 101:

> To perform or display a work "publicly" means—
>
> . . . .
>
> (2) to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Virtually every phrase of this definition evinces an intent to encompass on-demand services like those

provided by Cablevision.[7] All Cablevision subscribers are "capable of receiving the performance" of a particular audiovisual work by ordering it through the RS-DVR service. Each of these subscribers would receive the performance in their own individual homes, and at different times. The statute is explicit that neither of these latter facts takes Cablevision's system outside the scope of the exclusive public performing right. Moreover, the statute's insistence that a transmission "by means of any device or process" is a public performance further signals that the specific technological means employed by Cablevision are irrelevant to whether its conduct requires authorization from the copyright owners.[8] As this Court concluded in

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7. Indeed, a prescient House report almost seemed to be describing the RS-DVR system when it stated that the public performing right applied whenever a transmission is "capable of reaching different recipients at different times, as in the case of sound or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public." H.R. REP. No. 90-83, at 29 (1967). Although the Second Circuit "question[ed] how much deference this report deserves," because it was written nearly ten years before enactment of the 1976 Copyright Act (*Cartoon Network*, 536 F.3d at 135), the statutory language that the report explains was virtually identical to the language that ultimately became law. *See* William F. Patry, 4 PATRY ON COPYRIGHT § 14:16 (2008) ("With the exception of a minor amendment to the definition of 'to perform a work publicly' in 1974, the 1966 House Judiciary Committee bill's language on Section 106(4) and the relevant definitions in Section 101 were adopted in the 1976 Act.").

8. The same phrase recurs in the statutory definition of "perform." "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of *any device or process* . . . ." 17 U.S.C. § 101 (emphasis added). This is further evidence that Congress intended the public performing right to encompass myriad technologies of delivery and receipt.

Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198 (1931), in determining that dissemination of music to individual hotel guest rooms was a public performance, "the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance . . . which Congress has secured to the composer."

Instead of heeding this Court's instruction on that point, the court below zeroed in on the phrase "capable of receiving the performance." Although acknowledging that "the statute says 'capable of receiving the performance,' instead of 'capable of receiving the transmission'" (*Cartoon Network*, 536 F.3d at 134), the court below proceeded to direct all its attention to what the statute does not say, while ignoring what it does say. The opinion below phrases the operative question as "who precisely is 'capable of receiving' a particular *transmission* of a performance." *Id.* at 135 (emphasis added). Even if the transmissions made by Cablevision—like any point-to-point transmission—are "capable" of being received by only one party, that is not the question the statute asks. The lower court's tunnel vision allowed it to ignore the fact that thousands of other Cablevision subscribers, using the same service, were "capable of receiving the [same] performance,"—that is, the same program episode as originally acted, played, and recorded—albeit at different times and in different places.[9]

9. Interactive one-to-one transmissions are and have been treated as public performances since they were first developed. In 1995, at the dawn of the development of digital music services, Congress confirmed this interpretation by including a definition of "interactive service" in section 114 of the Copyright Act (providing a full exclusive right to sound recording producers). 17 U.S.C. § 114.

In this way, the decision below conflicts with *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1985) (one-to-one transmissions of video signals to private viewing booths were public performances). The Northern District of California similarly concluded that public performing rights were infringed by a hotel-operated computer which allowed guests to select movies from the hotel's collection for viewing in their rooms, at a time of the guests' choosing, via videocassette players maintained by the hotel in a centrally located equipment room. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). Such services are not legally distinguishable from Cablevision's transmissions to individual subscribers via the RS-DVR system.

The lower court sought to buttress its conclusion that the RS-DVR service involved no public performances by observing that it "only makes transmissions to one subscriber using a copy made by that subscriber." *Cartoon Network*, 536 F.3d at 137. But whether many, one, or no copies are used to generate the transmission is irrelevant to whether a public performance occurs. The Court of Appeals was simply wrong when it stated that "no transmission of an audiovisual work can be made, we assume, without using a copy of that work." *Id.* Indeed, the dominant forms of public performance under the transmit clause at the time the 1976 Act was drafted and enacted—broadcast television and radio—use no copies at all when a live performance of a song, opera, play, or other work is broadcast. The public performing right—first codified in 1897—has always applied to such broadcast transmissions, whether or not a copy was used to

generate them. *See, e.g., Jerome H. Remick & Co. v. Gen. Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926) (broadcast of live performance).

The lower court's reading of the transmit clause is simply impossible to reconcile with the statute and legislative history. The public performing right has nothing to do with the making of copies. Neither section 106(4), which establishes the public performing right, nor any of the accompanying definitional provisions in section 101 (including the transmit clause) makes any reference to copies, unlike the corresponding provisions establishing the reproduction and distribution rights. 17 U.S.C. §§ 106(1) and (3).

That the Second Circuit misread the statute is further shown by the Copyright Act's legislative history, which clearly expresses the intent to create a broad, technology-neutral public performing right:

> [T]he definition of "publicly" in section 101 makes clear that the concept[] of public performance . . . include[s] . . . acts that transmit or otherwise communicate a performance . . . of the work to the public by means of *any* device or process. The definition of "transmit" . . . is broad enough to include *all conceivable forms and combinations* of wired or wireless communications media, including *but by no means limited to* radio and television broadcasting as we know them. *Each and every* method by which the images or sounds comprising a performance . . . are picked up and conveyed is a "transmission,"

> and if the transmission reaches the public *in [any] [sic] form*, that case comes within the scope of [the public performing right].

H.R. REP. No. 94-1476, at 64 (1976) (emphasis added); S. REP. No. 94-473, at 61 (1975) (same). Surely Cablevision's RS-DVR service qualifies as a "conceivable form [or] combination[] of wired or wireless communications media," as well as a "method by which images or sounds comprising a performance . . . are picked up and conveyed." The Second Circuit's reading can be validated only if the phrase "*any* device or process" excludes a device or process that makes multiple copies of the initial performance, and then redelivers identical transmissions of the same performance, one at a time, on the command of the individual subscribers, into their homes. This conclusion contravenes the clearly expressed legislative intent of the 1976 Act, and invents an exception—for services that create copies of transmitted works—that has no basis in the law. Such a thoroughgoing misreading of the law deserves review and correction by this Court.

B. The Second Circuit Disclaimer Provides No Comfort to Composers of Music and Interferes with Congress' Intent to Make Exclusive Rights Divisible.

Almost as an admission of the convoluted reasoning underlying its interpretation of the public performing right, the Second Circuit stated that "[t]his holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating

one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." *Cartoon Network*, 536 F.3d at 139-40. This qualification of the opinion's misguided approach to public performances relies mostly on the potential applicability—although evidently not under the facts of this case—of the reproduction right. This provides little comfort to composers, whose livelihood is much more dependent on public performance royalties (predominantly those collected by *amici*) than on reproductions or distributions.

Moreover, this disclaimer ignores the fact that Congress intended to provide copyright owners with a "bundle of rights" that "may be subdivided indefinitely . . . and each subdivision of an exclusive right may be owned and enforced separately." H.R. REP. No. 94-1476, at 61 (1976); S. REP. No. 94-473, at 57 (1975); *see also* 17 U.S.C. § 201(d)(2). The decision below seeks to salve the wound it inflicts on the public performing right by noting that "the owner of a copyright . . . may be able to seek redress . . . for the underlying copying that facilitated the transmission," even if the transmission itself is defined out of the scope of the public performing right. *Cartoon Network*, 536 F.3d at 138. This overlooks the inconvenient fact that the owners of these two rights may be entirely different parties. Thus, there is no basis for assuming that the creator will be compensated on the swings for what she loses on the roundabouts. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2005) (Breyer, J., concurring).

In effect, the decision below tells the hundreds of thousands of BMI affiliates and ASCAP members that,

in the case of cleverly designed services for on-demand dissemination of their musical works, they must forgo both the revenues associated with the public performing right and the well-established efficiencies of collective administration of public performance royalties, and instead rely solely upon a more fragmented and disjointed strategy of attempting to license service providers for the exercise of the reproduction right.[10] This Court should grant certiorari to ensure that this scenario does not occur.

C. The Second Circuit Decision is Inconsistent with International Copyright Treaties to Which the United States is a Member.

The United States is obligated by international copyright treaties to provide a broad public performing right in its copyright law. The treaty obligations encompass public performances (also known as "communications to the public") regardless of the means of transmission of the performance, whether the transmission emanates from a single or multiple copies, or whether it is to multiple or individual recipients.

Compliance with these treaty obligations—under the Berne Convention ("Berne"),[11] the World Trade

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10. In addition, it ignores the reality of licensing music for certain works, such as the incorporation of music into television programs and films, which typically involves transfers of the composer's reproduction right without any means of continuing royalty remuneration absent a public performance royalty.

11. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221.

Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("WTO/TRIPs"),[12] and the World Intellectual Property Organization Copyright Treaty ("WCT")[13]—ensures the reciprocal payment of royalties for the use of the works of American songwriters abroad, and for the use the works of foreign rightholders in the United States under the principle of "national treatment."

Article 11 of Berne states that "[a]uthors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performances by any means or process; [and] (ii) any communication to the public of the performance of their works."[14] As the official guide to the Berne Convention notes, this provision applies "by any means or process" which covers live direct performances and it "covers performances by means of recordings." Claude Masouye, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* par. 11.4 (WIPO Publication 1978).

The requirements of the Berne Convention in Article 11 are incorporated into WTO/TRIPS (Art. 9, incorporating Berne Arts. 1-21) and the WCT (Art. 1, incorporating Berne Arts. 1-21). The WCT goes even

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12. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 81.

13. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

14. Article 14*bis* of Berne provides similar rights for owners of copyrights in cinematographic works.

further, obligating the United States to recognize, as part of the exclusive right of communication to the public, the rightholder's control over "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." WCT, Art. 8. Thus, Berne, the WTO, and WCT all require United States law to afford to creators a broad, technology-neutral exclusive right that embraces services of the type undertaken by Cablevision. While none of these treaties is self-executing in United States law, United States accession to each of them was based on a determination by the President, ratified by the Senate, that American law was compliant with the treaty obligations. These determinations followed the enactment of implementing legislation to bring American law up to the standard of each treaty.[15] None of these enactments required any amendment to the statutory provisions establishing the public performing right. *See generally* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

The Second Circuit decision in this case—especially as it applies beyond the RS-DVR context—will raise serious questions regarding United States compliance

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15. This Court has previously observed that even before the United States acceded to Berne in 1989, the 1976 Copyright Act brought United States law into compliance with Berne standards in some respects. *See Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003) (1976 Act aligned United States law with Berne with respect to term of copyright protection).

with its treaty obligations. ASCAP and BMI depend on reciprocal agreements with their foreign counterparts to collect royalties for public performance in overseas jurisdictions for the works of American composers. To the extent that BMI and ASCAP can no longer collect, on behalf of foreign composers, public performance royalties for on-demand services like the one involved in this case, these agreements with performing rights societies in foreign jurisdictions will be undermined. Such a scenario would compound the detrimental impact of the decision below on hundreds of thousands of American music creators.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Petition for a Writ of Certiorari be granted.

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CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* COPYRIGHT ALLIANCE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) educational organization dedicated to promoting copyright as an engine for creativity, jobs, and growth. It is a membership organization of individual artists and institutions, including corporations, trade associations, sports leagues, and unions. Its members come from a full range of creative industries, including musical composition, music publishing and sound recordings; book, magazine and newspaper publishing; business and entertainment software; visual arts, including illustration, graphic arts and photography; and motion pictures and broadcasting. Counsel of record for all parties have received timely notice of the intent to file this brief. All parties have given written consent to the submission of this brief.[1]

The Copyright Alliance has never before filed a brief in any court, but is impelled to do so in this case because the decision below could be so detrimental to the health of our copyright system. Cablevision's attempt to avoid paying for the right to provide its customers with copies and transmissions of copyrighted works undercuts the values that the Copyright Alliance exists to advocate. The decision

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Alliance members are, or are affiliates of, petitioners in this matter. Some may join other amicus briefs supporting the petition.

below threatens to undermine the markets for licensing of copyrighted works that have contributed so substantially to the culture, economy, workforce, and international competitiveness of the United States. For this reason, this case deserves this Court's attention.

The Copyright Alliance has over forty institutional members, including the American Federation of Television & Radio Artists (AFTRA); American Society of Composers, Authors and Publishers (ASCAP); American Society of Media Photographers (ASMP); American Intellectual Property Law Association (AIPLA); Association of American Publishers (AAP); Association of Independent Music Publishers (AIMP); Attributor; Broadcast Music, Inc. (BMI); Business Software Alliance (BSA); CBS Corporation; Church Music Publishers Association (CMPA); Directors Guild of America (DGA); Entertainment Software Association (ESA); Graphic Artists Guild; Imageline, Inc.; Imagery Alliance; Langley Productions; Magazine Publishers of America; Major League Baseball; Microsoft; Motion Picture Association of America (MPAA); National Association of Stock Car Auto Racing (NASCAR); National Collegiate Athletic Association (NCAA); National Football League; National Music Publishers' Association; NBC Universal; News Corporation; Newspaper Association of America; Picture Archive Council of America; Professional Photographers of America (PPA); Professional School Photographers Association; Recording Industry Association of America (RIAA); Reed Elsevier; SESAC; Software & Information Industry Association; Time Warner;

Universal Music Group; Viacom; Vin Di Bona Productions; The Walt Disney Company; and Writers Guild of America, West.

Two other Copyright Alliance members, the National Association of Broadcasters (NAB) and AT&T Inc. (AT&T), do not support the petition for certiorari because they believe the decision below was correctly decided.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Copyright Alliance members believe that copyright protection spurs innovation and gives incentives for cultural and technological progress that benefits the public. This Court has consistently endorsed that philosophy, and has also consistently instructed that Congress, rather than the courts, should craft copyright policy. The decision below deviates unjustifiably from that well-marked path. It threatens to render copyright incentives ineffective in myriad technological contexts, and will encourage the practice of using technology, not to deliver innovative products and services to consumers, but to navigate around the boundaries of copyright protection in order to avoid paying for uses that otherwise require licenses. It narrows beyond recognition, and in contravention of the plain language of the Copyright Act, the scope of two critical exclusive rights—reproduction and public

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[2] A third Alliance member, PPL, does not operate in the United States, and is not participating in this brief.

performance—that Congress accorded to creators. If left unreviewed, the decision will also undermine critical precedents of this Court that have kept the copyright law vital and fit for its constitutional purpose of promoting the "progress of science and useful arts."

Although this case arose in the context of reproduction and public performance of audio-visual works by a cable systems operator, its potential impact is much broader. First, by creating uncertainty regarding the applicability of the reproduction right to temporary copies, the decision below upsets the long-standing consensus view of other circuits and unnecessarily raises questions about U.S. compliance with international treaty obligations. Second, the Second Circuit's holding that attributes copying to Cablevision's customers rather than to Cablevision is not only entirely inconsistent with established precedents of this Court; it also validates a well-worn stratagem for evading responsibility and undermining licensing. The model of designing an elaborate technological system for unauthorized copying in a way that requires the customer to "push the button" is easily adaptable to other contexts, and will proliferate if this case is not reviewed. Finally, the Second Circuit's crabbed reading of the public performance right, which runs counter to the language of the statute and clear legislative intent, invites further use of technology to game the copyright licensing system, not only for audio-visual works but also for other works, such as music, that depend upon a robust exclusive right of public performance.

The Copyright Alliance respectfully asks this Court to decide the important issues presented in the petition.[3] If the Court declines to do so, the vitally important stamp of approval that this Court has consistently placed on the premise underlying article 1, section 8, clause 8 of the U.S. Constitution and Congress' exercise of the power granted therein will be diminished, along with the policies Congress chose to codify in the Copyright Act.

ARGUMENT

I. THE DECISION BELOW UNDERMINES OUR COPYRIGHT SYSTEM

The Constitution authorizes Congress to pass laws to "promote the progress of science and the useful arts." U.S. CONST. art. 1, § 8, cl. 8. "The economic philosophy behind the [Copyright] clause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors ..." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). This constitutional philosophy is codified in the Copyright Act of 1976. 17 U.S.C. § 101, *et seq.*

In the 1976 Act, Congress sought to provide authors with broadly defined exclusive rights to

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[3] In the Second Circuit, *amicus* briefs were filed on both sides on behalf of a plethora of nonprofit groups, entertainment companies, library associations, Internet companies, consumer advocates, sports leagues, publishers, and other organizations. This underscores that both sides believe this case raises extremely important issues.

engage in or to authorize certain uses of their works, regardless of the technological method involved. *See* Marybeth Peters, *The National Information Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS 341, 344 (1996) ("The drafters of the statute sought to be technology-neutral and forward-looking in their choice of terms and definitions.");[4] *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong., 1st Sess., Copyright Law Revision, pt. 6, 14 (Comm. Print 1965) (hereinafter "1965 Supp. Report") ("A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology ...").[5] Congress' approach was, in part, a response to difficult cases confronted by this Court involving methods of delivering works to members of the public that were unanticipated at the time the previously applicable Copyright Act was written. *See, e.g.*, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394

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[4] Ms. Peters is Register of Copyrights.

[5] Although the Register of Copyrights' revision reports were not drafted by Congressional committees, they played a key role in the revision process that resulted in the passage of the 1976 Copyright Act, and this Court has repeatedly relied on them as explications of the statute. *See, e.g.*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 355 (1991); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 746 & 748 (1989); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 160 (1985); *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 462 n.9 (1984) (Blackmun, J., dissenting).

(1974); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).[6]

"[I]t is generally for Congress, not the courts, to decide how to best pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). In the 1976 Act, Congress decided to provide authors with exclusive rights that apply across all delivery methods in an effort to ensure that our copyright system would remain healthy and able to produce a vibrant cultural marketplace during what it anticipated to be a coming explosion of technological progress. *See* 1965 Supp. Report at xiv-xv (discussing "the revolution in communications"). In many ways, copyright protection itself has served as a catalyst of that explosion. Ingenious new means of disseminating material would be of little value to the public without the creative content they make available, content for whose production the copyright system gives powerful incentives. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-29 n.8 (2005) (warning against overstating the "mutual exclusivity" of "the respective values of

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[6] In this way, the 1976 Act embodies Congress' preference for this Court's approach to exclusive rights in *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931), and the conclusion that "the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly ... Congress has secured to the [copyright owner]." *See* H.R. REP. NO. 94-1476, at 87 (1976) ("The Committee ... accepts the traditional, pre-*Aiken*, interpretation of the *Jewel-LaSalle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act.").

supporting creative pursuits through copyright protection and promoting innovation in new communication technologies").

The public has benefitted most concretely from such technological innovation when it is deployed in the context of copyright licensing arrangements. The Copyright Act reflects this fact by requiring the providers of innovative delivery channels to compensate copyright owners if they engage in conduct reserved to authors. Put another way, the requirements of the Copyright Act prevent the symbiotic relationship between creative authors and providers of innovative delivery mechanisms—a relationship that increases public access to ideas and entertainment—from degenerating into parasitism.

In this case, Cablevision, while firmly anchored in symbiotic relationships with copyright owners through a complex web of licensing arrangements, devised a new method for delivering its licensed cable television programming to its subscribers on-demand. In itself, this is not objectionable, and should indeed be encouraged. The only reason that the parties are now before this Court is that Cablevision refused to pay for the right to implement this new delivery method, even though it involves reproducing and publicly performing copyrighted material, conduct that Congress has deemed copyright infringement when unauthorized. 17 U.S.C. §§ 106(1) & (4). Although Cablevision plans to receive payment from its subscribers for the privilege of viewing programming on-demand, *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y.

2007), *rev'd, Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008). Cablevision wants to keep the money for itself rather than compensating copyright owners.

To justify its behavior, Cablevision, before the courts below, pointed to superficial similarities between the programming delivery service Cablevision developed and the technology at issue when this Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the VCR.[7] Brief of Defendants-Counterclaimants-Appellants at 16-18, *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Essentially, Cablevision argued that under *Sony* any service that enables consumers to view television programming at a time of their choosing rather than at the time the programming is originally transmitted to the public must be treated under a secondary liability rubric rather than as direct infringement. *Id.* at 17. Cablevision offered strained interpretations of the broad reproduction and public performance rights in order to explain why Cablevision's conduct requires a secondary liability analysis.

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[7] These superficial similarities are greatly outweighed by the distinctions between Cablevision's service and a VCR. Cablevision's service much more resembles typical video on-demand ("VOD") services, routinely carried out under license, than it does the sale of an electronics product to consumers. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 619 ("The RS-DVR, contrary to defendants' suggestions, is more akin to VOD than to a VCR, STS-DVR, or other time-shifting device. In fact, the RS-DVR is based on a modified VOD platform.").

Neither the *Sony* opinion nor the Copyright Act lines up with Cablevision's arguments. *Sony* nowhere instructs lower courts that companies that enable delayed viewing of television programming can only qualify as infringers under theories of secondary liability. *See Grokster*, 545 U.S. at 934 (it is error to convert *Sony* from a case "about liability resting on imputed intent to one about liability on any theory"). Indeed, no claim that Sony, as the manufacturer of the VCR, was a direct infringer was ever before this Court in that case. *Sony*, 464 U.S. at 435 n.17. Instead, this Court applied a secondary liability analysis in *Sony* because that case involved what this Court called "unprecedented" claims focused on imposing liability for sales of "an article of commerce that is not the subject of copyright protection." *Sony*, 464 U.S. at 421. *See also Grokster*, 545 U.S. at 931 (*Sony* involved "a claim that secondary liability . . . can arise from the very distribution of a commercial product").

In contrast, this case involves Cablevision's direct sales of copyrighted programming to consumers at subscription prices.[8] In addition, the *Sony* opinion was an effort to find the appropriate "balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly and the rights of others to engage in substantially unrelated areas

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[8] *Sony* is also distinguishable from this case because in *Sony* "the material was broadcast free to the public at large," *Sony*, 464 U.S. at 425, whereas Cablevision provides programming only to its paying subscribers.

of commerce." *Sony*, 464 U.S. at 442. That balancing challenge is not present here since Cablevision's activities are not only substantially related to the rights of copyright owners, but also consist primarily of the unauthorized exercise of those rights.

The district court rightly rejected Cablevision's arguments as baseless attempts to justify an effort to design around compensating copyright owners. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 618 ("Cablevision's reliance on *Sony* is misguided."). However, on appeal, the Second Circuit adopted Cablevision's interpretation of *Sony* wholeheartedly, *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008), and then appeared to reason its way backward to cramped views of the reproduction right and the public performance right that conflict with Congress' technology-neutral approach.[9] If the Second Circuit's decision stands, its misreading of *Sony* will likely proliferate and encourage technologists to focus their efforts on designing methods of delivering creative material to their customers without paying for the privilege. It will encourage providers of delivery services, both within and beyond the sphere of cable television, to devote their ingenuity, less to better means of delivery and more to circumvention of the perimeters of copyright protection. Such conduct does not promote the "progress of science and useful arts" that the Framers sought to encourage through copyright law.

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[9] This brief discusses the reproduction right and the public performance right at more length in Part II, *infra*.

This case is not the first to bring before this Court a lower court decision that misread the *Sony* precedent in a way that encourages the channeling of technological ingenuity into the evasion of copyright protections. In *Grokster*, the lower court's erroneous reliance on *Sony* in a case where liability could be properly premised on an inducement theory impelled this Court to review the lower court opinion, and ultimately to reverse it unanimously. *Grokster*, 545 U.S. at 934. This case, where the lower court also misapplied *Sony*, this time to deny a direct infringement remedy, calls for this Court's scrutiny as well.

This Court has previously warned that "[t]he promise of copyright would be an empty one if it could be avoided" merely by crafting a creative legal argument. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985). Yet the decision below encourages and propagates just such a strategy in the sphere of technological innovation. If companies that are in the business of selling copyrighted material to their customers can avoid paying copyright owners for the right to do so by designing complicated delivery systems, "our engine of free expression" may begin to underperform. *Id.* at 558. The result will be injury to the public due to a reduced marketplace of ideas that no longer inspires the creation of either interesting content or innovative delivery methods. *See Eldred*, 537 U.S. at 213 n. 18 (Public and private "ends are not mutually exclusive; copyright law serves public ends by providing individuals with incentive to pursue private ones.").

As Justice Breyer stated in his concurring *Grokster* opinion, "[n]o one disputes that 'reward to the author or artist serves to induce release to the public of the products of his creative genius.'" *Grokster*, 545 U.S. at 961 (Breyer, J., concurring) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)). The decision below rewards a creative method of undermining copyright protection and gaining profit from the works of others, rather than rewarding the creation of expression itself. For this reason, above all others, the decision calls out for review by this Court.

II. SERIOUS ERRORS IN THE SECOND CIRCUIT'S ANALYSIS MERIT REVIEW

The petition for certiorari seeks this Court's review of three major holdings of the Second Circuit Court of Appeals. The Copyright Alliance submits that on each of these issues, the decision below invites the sort of technological gamesmanship described in the preceding section, which our technology-neutral copyright law system is intended to discourage. *Amicus* also submits that the repercussions of each holding may extend well beyond the context of cable delivery services for audio-visual works, presenting an unjustifiable risk of de-stabilizing well-established licensing markets.

A. The Second Circuit's Treatment of Temporary Copies Conflicts With Long Settled Case Law and International Agreements

The Second Circuit held that the copyright owner's reproduction right does not extend to a complete copy of a work, even one that is sufficiently permanent or stable to be further reproduced or communicated, if the copy does not satisfy a "duration requirement" that the court believed to be imposed by the statute. *Cartoon Network*, 536 F.3d at 127-130. This conflicts with a long line of cases from several circuits, beginning with *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). These cases have held that a copy falls within the scope of the reproduction right so long as that copy can be "perceived, reproduced, or otherwise communicated," a test clearly satisfied in this case. *Cartoon Networks*, 536 F.3d at 128.[10] The decision below did not spell out any test for determining whether a particular copy of a work satisfies its "duration requirement"; it simply concluded that "a fleeting 1.2 seconds" was not long enough. *Id.* at

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[10] The Second Circuit claimed its holding was compatible with *MAI Systems*, but its construction of that case is untenable. It concluded that *MAI Systems* did not hold, "as a matter of law, [that] loading a program into a form of RAM *always* results in copying." *Id.* at 128 (emphasis in original). However, this reading of *MAI Systems* conflicts with the Ninth Circuit's own description of the holding in that case. *See Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333-34 (9th Cir. 1995) ("we held that the loading of MAI's operating system software into RAM [random access memory] makes a 'copy' under the Copyright Act").

129. The decision below thus injects a high degree of uncertainty into an aspect of the fundamental exclusive right of reproduction that most courts have treated as long settled. *See, e.g.*, *Stenograph LLC v. Bossard Assocs., Inc.*, 144 F.3d 96, 101 (D.C. Cir. 1998) ("Courts that have addressed the issue agree that the loading of software ... to the computer's random access memory ('RAM') when the software is 'booted up' causes a copy to be made."). While other circuits may still apply the objective, bright line rule of *MAI Systems* and its progeny, in the Second Circuit a case-by-case evaluation must now be made, without clear standards, to determine whether a particular unauthorized copy of a work even implicates the copyright owner's reproduction right. *See Cartoon Network*, 536 F.3d at 130 (calling its approach to temporary copies "fact-specific").[11]

The question "how long is long enough?" is not an academic nicety; it has real-world consequences. Increasingly, the full economic value of a copyrighted work can be realized without ever making a permanent copy. This phenomenon is particularly advanced with regard to computer programs, which are protected by copyright as literary works,

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[11] This rule also is at odds with the Register of Copyrights' interpretation of the reproduction right. *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT, at 111 (Aug. 2001) ("Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights."), *available at* http://www.copyright.gov/reports/studies/dmca/dmca_study.html.

Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 702 (2d Cir. 1992), and which are increasingly distributed to end-users only as temporary copies. For instance, it has been the case for some years that employees of a company that meets some of its software needs through an application services provider ("ASP") model will, when they need a particular application, access it on a remote server operated by a third party; download the program into the RAM of their workstations only as long as it is needed for a particular task; and then make that portion of computer memory available for overwriting as soon as the task is completed. *See* Carole Levitt and Thomas B. Fleming, *Application Service Providers Are Gaining Acceptance*, 24 LOS ANGELES LAW. 56 (2001). A more current and powerful version of this model, known as "cloud computing," envisions that not only computer programs, but also other resources, such as discrete works contained in databases, will normally be stored remotely, accessed only when and as long as needed, with no permanent copy ever being made by the user. *See* Stephen Baker, *Google and the Wisdom of the Clouds*, BUSINESSWEEK, Dec. 24, 2007, at 48, 49-53.

The copies that users obtain in both the ASP and cloud computing models are clearly stable enough to be used for their intended purpose, but may not exist long enough to satisfy the Second Circuit's additional "duration requirement" for copyright protection. Thus, the decision below may call into question the ability of a copyright owner to enter into an enforceable license for these "fleeting," short-term uses of its works, as well as its capability

to bring infringement actions against those who access these works without a license, or in excess of licensing provisions, solely for the purpose of extracting their value through making a short term copy. Furthermore, the decision provides an incentive for users to design their systems so as to minimize the time during which they retain a copy of a work, in order to be able to claim that at least some of the copies they make fall outside the scope of the reproduction right altogether, and thus do not constitute a licensable transaction.

Ensuring that the scope of the reproduction right in the copyright statutes of our trading partners fully covers temporary copies has been a major goal of U.S. trade negotiators in recent years. For example, article 17.5.1 of the U.S.—Chile Free Trade Agreement[12] requires each party to "provide that authors of literary and artistic works have the right to authorize or prohibit all reproductions of their works, in any manner or form, *permanent or temporary (including temporary storage in electronic form).*" Including such language in our trade agreements is consistent with the requirements of other multilateral copyright treaties that the U.S. has implemented, which have long recognized the need to include temporary copies within the scope of the reproduction right. *See, e.g.*, Berne Convention

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[12] The U.S.—Chile Free Trade Agreement was signed on June 6, 2003. The full text is available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

for the Protection of Literary and Artistic Works, art. 9(1), Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221 (hereinafter "Berne Convention") (obligation to protect "the exclusive right of authorizing the reproduction of works, *in any manner or form*") (emphasis added); WIPO Copyright Treaty, art. 1(4), Dec. 20, 1996, 36 I.L.M. 65 (hereinafter "WCT") (containing "agreed statement" that article 9 of the Berne Convention "fully appl[ies] in the digital environment"). Although these treaty obligations are not directly enforceable in federal court, *see, e.g.*, Berne Convention Implementation Act of 1998, § 3, Pub. L. No. 100-568, 102 Stat. 2853 (1988), they reinforce the fact that the Second Circuit's decision will, if unreviewed, upset well-established law, increase uncertainty in global as well as domestic markets for copyrighted works, and bring the U.S. into potential conflict with our trading partners.

B. The Second Circuit's View of the Reproduction Right Conflicts with *New York Times Co. v. Tasini*

Unlike the temporary copies discussed in the preceding section above, there was no dispute below that the unauthorized copies of audio-visual works that will reside on Cablevision's system and facilitate Cablevision's transmissions of programs to its subscribers meet all the requisites to be covered by the copyright owner's exclusive reproduction right. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 617. Thus, the Second Circuit focused its analysis on who makes these copies, "Cablevision [or] the customer." *Cartoon Network*, 536 F.3d at

130. Although the court found that Cablevision engaged in the volitional conduct of "designing, housing, and maintaining a system that only exists to produce a copy," *Id.* at 131, it concluded that Cablevision's customers were the only ones actually making the copies. Essentially, the court below absolved Cablevision of any liability for direct infringement of the reproduction right because Cablevision's copying system responds to customer requests at the push of a button. *Id.* (focusing on "the person who actually presses the button").

This holding touches on a critical aspect of copyright law development in the digital environment. Technological progress in a host of fields shares the common characteristic of transforming repetitive tasks that used to be done by human beings into the work of machines. While the input and the output may be the same in both cases, the agency role of human and machine has shifted. But as this Court has held, the introduction of machinery into the mix should not in itself allow a business to sell copyrighted material directly to its customers without paying for the privilege. *See New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504 (2001) (defendants "are not merely selling 'equipment'; they are selling copies").

The Second Circuit's error was that it focused too much on what it believed to be a "significant difference . . . between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct."

Cartoon Network, 536 F.3d at 131-32. In fact, the difference is much less significant than the court thought, and certainly ought not be dispositive.[13] Instead, under this Court's decision in *Tasini*, the court should have focused on whether Cablevision was the source of the programming being copied. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 619 ("Cablevision would not only supply a set-top box for the customer's home, but it would also decide which programming channels to make available for recording and provide that content . . . .").

This conflict with *Tasini*, unacknowledged by the court below, fully merits review by this Court because similar issues are likely to arise throughout the copyright marketplace. Eliminating the human employee from the copying process is an economic imperative, for the same reason that we no longer have elevator operators or gas station attendants. It does not follow that a provider of services that include copying of works should reap not only the savings in personnel costs, but also the windfall of no longer having to obtain a license in order to achieve exactly the same result: a copy requested by a customer. Even less should such businesses be given

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[13] One of the leading cases on this issue in the digital environment is a district court decision from thirteen years (and several Internet generations) ago. *See Religious Tech. Center v. Netcom Online Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). That decision arose from automated copying as a core function of the Internet. Whatever its validity in that context, it should not control the analysis on the very different facts of this case.

further incentives to design elaborate technological systems for unauthorized copying, from which they can evade copyright liability simply by requiring the customer to "push the button."

Even when a provider continues to enter into a licensing arrangement, the position espoused in the decision below could encourage evasions of responsibility. For instance, commercial photographers increasingly license "online proofing services" to produce prints during a stated time period for the photographers' clients, particularly those physically distant from the photographers' studio. A service that allowed copying by clients outside the predetermined time frame, or by non-clients, could rely on the decision below to claim that any copying that occurred was done by its customer, not by it. Similarly, publishers license online services to distribute electronic copies of books (i.e., "e-books") to consumers. The ruling below could empower such a service to offer its customers unauthorized channels to access the same material—for example, through online searches that generate advertising revenue for the service, but not for the copyright owner.

As these examples indicate, the repercussions of the decision below are in no way confined to the facts of this case, but will instead affect a wide range of copyright owners in a broad spectrum of settings. Automated copying is an increasingly ubiquitous feature of the copyright landscape. The decision below opens the door to evasions of responsibility by centralized service providers who choose, through technological design decisions that have no

relationship to optimal functionality, to transfer responsibility to thousands of anonymous end users. This Court has long been concerned that the copyright law must provide an "effective—not merely symbolic" means for enforcement of the exclusive rights of authors. *Sony*, 464 U.S. at 442. This is precisely the concern that motivated this Court in *Grokster* to clarify the applicability of theories of indirect infringement; it should take the corresponding opportunity here to clarify the applicability of *Tasini* to Cablevision's efforts to design around the reproduction right.

C. The Second Circuit's Interpretation of the Public Performance Right Conflicts with the Plain Language of the Copyright Act as Well as the Legislative History

The decision below gives an unprecedented narrow reading to an exclusive right that Congress clearly intended to have a broad scope. The court held that nothing in the Cablevision programming delivery system infringed the public performance right because Cablevision "only makes transmissions to one subscriber using a copy made by that subscriber." *Cartoon Network*, 536 F.3d at 137. In other words, under the decision below, a service provider's transmission of a copyrighted work to paying customers does not infringe the public performance right if the service provider enables each customer to request the creation of a unique copy of the work to facilitate the transmission viewed by that customer.

The public performance right is one of the strongest examples of Congressional intent that the copyright law be applied in a technology-neutral fashion, and that technological gamesmanship to design around the boundaries of exclusive rights should not be condoned. Both in the definition of "perform," and in the key "transmit" clause of the definition of the public performance right, the statute makes it clear that the type of "device or process" employed is irrelevant, so long as the same performance of a work is capable of reaching members of the public. 17 U.S.C.§ 101. The legislative history is even more forceful, asserting that "*[e]ach and every method* by which the images or sounds comprising a performance ... are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, that case comes within the scope" of the right. H.R. REP. NO. 94-1476, at 64 (1976) (emphasis added).[14] The Second Circuit's carve-out of Cablevision's transmissions because each of them is associated with a specific and unique unauthorized copy of the programming in question is completely unmoored from the statute, which nowhere even hints that the

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[14] The Register of Copyrights has also endorsed the broad scope of the public performance right. *See Music Licensing in Restaurants and Retail and Other Establishments: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 17 (1997) (statement of Marybeth Peters, Register of Copyrights) ("With respect to music, the public performance right is the most important of the copyright bundle of rights ... The present copyright law, which was enacted in 1976, recognizes the importance of this right: section 106(4) gives copyright owners a very broad public performance right.").

number of copies used could ever disqualify a particular transaction from coverage under this capacious right.

The decision below provides a clear roadmap that other businesses could use to evade their obligations under the public performance right. The Second Circuit's closing caveat does not even attempt to argue otherwise, merely reminding the reader that the elimination of liability under the public performance right does not necessarily apply to other claims. *Cartoon Network*, 536 F.3d at 139-40. But Congress intended to create, not a single right with a single owner, but a "bundle of rights" that could be "subdivided indefinitely." H.R. REP. NO. 94-1476, at 61. The theoretical viability of other claims will be of cold comfort to copyright owners dependent on the public performance right, such as musical composers represented by Copyright Alliance members ASCAP, BMI, and SESAC. If this Court does not grant the petition, these creators could forfeit the efficiencies these collective administration organizations provide in the collection and disbursement of public performance royalties.

To the extent that other service providers, especially in the online environment, make the same technological choice as Cablevision, they will reap the same financial benefit—the ability to stop paying license fees for streaming delivery of performances of musical and other works. These deliveries would clearly constitute public performances, but for a decision to associate the stream to each customer with a unique copy. There may or may not be

technological advantages to such a choice; but under the decision below, the financial windfall of liberation from the strictures of copyright licensing could weigh heavily in the balance. In order to vindicate the contrary intent of Congress when it enacted the technology-neutral 1976 Copyright Act, and in particular the broadly phrased public performance right, this Court should grant review.[15]

CONCLUSION

For the reasons set forth herein, amicus respectfully asks the Court to grant the petition.

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[15] As with the temporary copies issue discussed above in Section II(a) *supra*, the Second Circuit's public performance right ruling raises serious questions about U.S. compliance with its international treaty obligations. *See, e.g.*, Berne Convention, art. 11 & 14*bis*; WCT, art. 8.

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No. 08-448

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL.,
Petitioners,

v.

CSC HOLDINGS INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE MAJOR LEAGUE BASEBALL, NATIONAL FOOTBALL LEAGUE, NATIONAL COLLEGIATE ATHLETIC ASSN., METRO-GOLDWYN-MAYER STUDIOS INC., CARSEY-WERNER DISTRIBUTION, DICK CLARK PRODUCTIONS, INC., LITTON SYNDICATIONS INC., TELCO PRODUCTIONS INC., WESTERN INTERNATIONAL SYNDICATION, AND THE PROGRAM EXCHANGE IN SUPPORT OF PETITIONERS

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November 5, 2008

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INTEREST OF THE AMICI CURIAE[1]

Amici ("Section 111 Copyright Owners") are all owners of copyrighted programs ("works") broadcast by television stations whose signals are retransmitted by cable systems under the compulsory licensing plan enacted in 17 U.S.C. § 111. The Section 111 Copyright Owners have actively participated in legislative, administrative, and judicial proceedings involving the Section 111 cable compulsory licensing plan. The Section 111 Copyright Owners share in the cable compulsory royalties paid by cable systems and distributed to copyright owners under the statutory license.

Major League Baseball receives Section 111 royalties on behalf of all Major League Baseball clubs whose live baseball games are broadcast by retransmitted television stations.

National Football League ("NFL") receives Section 111 royalties on behalf of its clubs whose live football games are broadcast by retransmitted television stations.

National Collegiate Athletic Association ("NCAA") is a voluntary organization through which

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[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the Clerk's office. Counsel of record for all parties received timely notice of *amici's* intent to file this brief. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no counsel, party, or person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

the nation's colleges and universities govern their athletics programs. NCAA receives Section 111 royalties on behalf of itself and its members for live college team sports events, such as college football and basketball games that are broadcast by retransmitted television stations.

Metro-Goldwyn-Mayer Studios Inc. ("MGM") receives Section 111 royalties for movies such as "Goldfinger," "The Good, The Bad and The Ugly," and "Rocky" that are broadcast by retransmitted television stations.

Carsey-Werner Distribution receives Section 111 royalties for series programs such as "Roseanne" and "The Cosby Show" that are broadcast by retransmitted television stations.

Dick Clark Productions, Inc. receives Section 111 royalties for program specials such as "The Golden Globe Awards" that are broadcast by retransmitted television stations.

Litton Syndications Inc. receives Section 111 royalties for series programs such as "Business Week" and "Animal Adventures" that are broadcast by retransmitted television stations.

Telco Productions, Inc. receives Section 111 royalties for series programs such as "Missing" and "Animal Rescue" that are broadcast by retransmitted television stations.

Western International Syndication receives Section 111 royalties for series programs such as

"It's Showtime At The Appollo" and "Showtime in Harlem" that are broadcast by retransmitted television stations.

The Program Exchange receives royalties for animated series programs such as "Dennis The Menace" and "Garfield and Friends" that are broadcast by retransmitted television stations.

The new service at issue (Cablevision's RS-DVR service) allows cable systems to deliver for a separate fee to subscribers those same television programs, including *amici's* programs, that cable systems are allowed to offer their subscribers under the Section 111 plan. The decision below finds cable systems incur no liability to any owner for this separate program delivery via RS-DVR service. That result directly contravenes Section 111's purpose and intent. Section 111 resolved the contentious issue of cable systems' commercial use of television station programming by permitting delivery of that programming without consent of owners under a set of rules that requires *simultaneous* retransmission of the programming and submission of royalty reports and payments to the Copyright Office.

A cable system that fails to follow those rules when delivering television station programs to its subscribers commits an act of infringement. As the RS-DVR service does not comply with the statutorily-prescribed rules, its use to deliver television station programming to subscribers is an infringing act.

The Section 111 Copyright Owners offer the viewpoint, which was not addressed by the decision below, of the copyright owners who are compelled by the Section 111 plan to allow their television station programming to be delivered by cable systems to paying subscribers without any right to negotiate the terms and conditions of such delivery. The Section 111 Copyright Owners seek to uphold the intent of Section 111, which was to redress the inequity of the then-exiting law under which cable systems captured the entire value of their commercial use of retransmitted television station programming without any liability to copyright owners. To carry out that intent, Congress struck a balance that allows cable systems to deliver the programs embodied in retransmitted television station signals without copyright liability *only* upon compliance with statutorily-prescribed conditions. The decision below upsets that balance by allowing cable systems to gain the entire commercial value of the new RS-DVR system's ability to deliver television station programming to subscribers in a manner that violates the plan established by Congress in Section 111.

SUMMARY OF ARGUMENT

This case again raises what has been a controversial issue since cable systems first began to operate roughly a half century ago: the copyright liability of cable systems for delivering to their subscribers programs broadcast by retransmitted television stations. This Court addressed the issue in two decisions (*Fortnightly* and *Teleprompter*) decided under the prior copyright law, and Congress

spent nearly a decade seeking to resolve the issue before finally passing Section 111 of the current law. Since passage of Section 111, the issue has been raised repeatedly as new systems for delivering television station programming to subscribers have been introduced.

Cablevision's RS-DVR service is the latest system for delivering television station programming to subscribers, and, as has been the case with virtually all earlier program delivery systems, it has engendered copyright liability controversy and litigation. Despite the fact that the RS-DVR service will deliver television programs broadcast by retransmitted television signals, a matter clearly within the ambit of Section 111, the Second Circuit's decision does not address the Section 111 issue. Instead, the decision below, despite the seismic shift in the law since that time, follows essentially the same path that this Court took in its two pre-Section 111 opinions on the subject. As this Court's approach was expressly overturned by passage of the new copyright law, including Section 111, the decision below fails to follow the new statutory regime as to how copyright liability of cable systems in these circumstances is to be determined.

Section 111 establishes conditions for cable systems to obtain the benefit of its compulsory licensing plan, and specifies that non-complying cable systems commit an act of infringement by delivering programs from retransmitted television stations to their subscribers. Cablevision's RS-DVR service does not meet the statutory conditions. In particular, Section 111 requires that the television

programs be delivered to subscribers simultaneously with their broadcast on the retransmitted television stations. The purpose of the RS-DVR is, however, to allow subscribers to view such programs after their broadcast, and thus delivery is not simultaneous.

The Second Circuit did not undertake a statutory compliance analysis in examining Cablevision copyright liability for the RS-DVR service. This failure adversely affects the rights of all copyright owners, including the *amici*, whose programs broadcast by retransmitted television stations can now be separately provided to subscribers without liability even though RS-DVR delivery does not comply with the requirements of Section 111. That result is inconsistent with the congressional conclusion that cable systems are liable for their commercial use of such programming.

REASONS FOR GRANTING THE WRIT

1. The circumstances here call to mind the maxim: "Plus ça change, plus c'est la même chose." The same principles considered as controlling nearly 40 years ago in two cases related to cable's delivery of copyrighted works embodied in retransmitted television station signals were again found controlling below, despite the fact that in the intervening years both the technology involved and the legal context have changed dramatically. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968), this Court examined the liability for delivery of such works through the prism of whether the function performed by a cable (or CATV, as it was then called) system in

retransmitting television station signals was akin to that of a viewer or to that of a broadcaster:

> CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Footnote omitted; *see Teleprompter Corp. v. Columbia Brdcstg. Sys., Inc.* 415 U.S. 394, 408-09 (1974) (applying same analysis to retransmitted distant television station signals).

The instant decision below followed much the same path, albeit modified to fit the more sophisticated computer technology involved. Thus, the Second Circuit reasoned that if a subscriber could save a television station program for later viewing on his or her own DVR without liability, then Cablevision could provide a centralized RS-DVR service for paying subscribers without liability.

The Second Circuit analogized the RS-DVR service to a photocopying store that offers a centralized place in which customers can make copies without the store's incurring liability as an infringer: "Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor 'makes' any copies when his machines are actually operated by his customers." Pet. App. 22a (citation omitted); *see id.* 20a-21a (same, but using VCR analogy).

Additionally, in both situations, this Court and then the Second Circuit considered whether a cable (CATV) system had an active role in selecting the television station programming being delivered to subscribers as determinative of the copyright liability question.

> Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold the CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

Fortnightly, 392 U.S. at 400-01 (footnote omitted); *see Teleprompter*, 415 U.S. at 409-10 (same). The Second Circuit below employed much the same

reasoning, albeit again with changes to reflect the current technology:

> Cablevision has no control over what programs are made available on individual channels or when those programs will air, if at all. In this respect, Cablevision possesses for less control over recordable content than it does in the V[ideo]O[n]D[emand] context, where it actively selects and makes available beforehand the individual programs available for viewing. For these reasons, we are not inclined to say that Cablevision, rather than the user, "does" the copying produced by RS-DVR system.

Pet. App. 23a-24a.

While the similarities between the analytical approach taken by the Second Circuit and that of this Court in *Fortnightly* and *Teleprompter* might be expected on precedential grounds (though the Second Circuit cited neither case), that expectation fails to consider the tectonic shift in the legal landscape concerning cable systems' copyright liability for delivering retransmitted television station programming to their paying subscribers. That shift occurred shortly after *Teleprompter* was decided with enactment of the new copyright law, 17 U.S.C. § 101 *et seq.*, ("the 1976 Act") including the Section 111 statutory license, which directly overturned *Fortnightly* and *Teleprompter*, and thus

resolved a long-simmering contentious issue between program owners and cable systems.

2. Congress employed a two-part fix to the issue. First, it expanded the definition of exclusive rights that an owner enjoys to include "to perform the copyrighted work publicly" and "to display the copyrighted work publicly." 17 U.S.C. § 106 (4) and (5), respectively. Second, it defined "publicly" in 17 U.S.C. § 101 to include: "to transmit or otherwise communicate a performance or display of the work . . . by means of any device or process . . . ." Thus, an owner's exclusive rights under the Copyright Act includes the right to "transmit," which § 101 defines as "to communicate [a performance or display] by any device or process whereby images or sounds are received beyond the place from which they are sent." Those expansions of exclusive rights and the definitional changes were explicitly designed to overturn *Fortnightly* and *Teleprompter*:

> Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus for example: . . . a cable television system is performing where it retransmits the broadcast [of a television station program] to its subscribers.

H.R. Rep. No. 1476, 94th Cong. 2d Sess. 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 ("H.R. No. 1476"). *Compare Fortnightly*, 400 U.S. at 401 ("We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.") (footnote omitted).

Whether, in light of the statutory changes, the same reasoning as applied in *Fortnightly* and *Teleprompter* (both decided under the prior copyright law) can continue to control analysis of cable systems' liability for a new means of delivering retransmitted television station programming is a critical question of national importance that should be addressed by this Court. The Section 111 Copyright Owners submit that the changes instituted by the 1976 Act render the Second Circuit's analysis invalid to determine Cablevision's copyright liability for its delivery via the RS-DVR service of copyrighted programs embodied in retransmitted television station signals.

Having created an exclusive right to "transmit" and having established cable systems' liability for delivering television station programming to subscribers, Congress next set about to formulate a liability plan applicable to delivery of such programming. *See* H.R. No. 1476 at 89 (noting goal of legislation was "to consider and determine the scope and extent of such liability"); *see also Teleprompter*, 415 U.S. at 414 & n. 16 ("Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."). Resolution of the copyright liability of

cable systems for delivery of television station programming slowed passage of the current Copyright Act with a decade-long debate that involved not only difficult and contentious copyright issues, but also "intricate and complicated rules and regulations" governing communications policy. *See generally* H.R. No. 1476 at 88-89; *see also id.* 47-50 (giving a more complete discussion of the 1976 Act's long history).

Congress resolved those many sensitive and important problems by creating an entirely new compulsory license plan designed specifically for cable's delivery of television station programming. H.R. No. 1476 at 90. This new plan shifted the paradigm for liability questions concerning cable's delivery of such programming from traditional infringement considerations to a compliance determination based on the new plan. Congress eschewed this Court's approach of determining whether cable systems are more like broadcasters or more like viewers in favor of one resting on economic realities of the cable business. "[T]he Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs." H.R. No. 1476 at 89; *see also id.* at 88 (same). To avoid what Congress saw as "impractical and unduly burdensome" private negotiations to determine payments for delivery of television station "copyrighted program material," *id.*, Congress established a royalty reporting and payment plan

with statutorily-imposed fees to be administered by the Register of Copyrights. *Id.* at 91.

3. The express language of Section 111 demonstrates the encompassing nature of the compulsory licensing plan as governing cable systems' delivery of television station programming. The provision, 17 U.S.C. § 111(c)(1), that "establishes the compulsory license for cable systems generally," H.R. No. 1476 at 93, states in relevant part: ". . . secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station . . . shall be subject to statutory licensing upon compliance" with specified conditions. The plan's focus for liability questions on the programs embodied in retransmitted television station signals is also seen in the royalty payment scheme, which depends on a newly-created term, "distant signal equivalent," under which "the copyright liability of cable television systems under the compulsory license [is] limited to the retransmission of distant non-network programming." H.R. No. 1476 at 90. That intent is carried over to the definitional provision, 17 U.S.C. § 111(f), which defines "distant signal equivalent" as the value assigned to "any nonnetwork programming carried by a cable system" on a distant basis. *Id.*; *see* 17 U.S.C. § 111(d)(1)(B) (royalty payment schedule using sliding scale tied to total distant signal equivalents). Finally, the distribution of the royalty fees thus collected by the Register of Copyrights is made to "copyright owners who claim that their works were the subject of secondary transmissions by cable systems." § 111(d)(3).

Because the copyrighted works subject to the compulsory license are embodied in retransmitted television station signals, Congress identified retransmission (or "secondary transmission," as it is called in Section 111) as incorporating a key limitation to cable systems' carriage rights under the plan, *viz.*, that retransmission occur "simultaneously with the primary transmission" for systems within the continental United States. § 111(f); *see* 17 U.S.C. § 111(e) (allowing limited non-simultaneous retransmission outside the continental United States). The limitation restricts the manner in which cable systems within the continental United States may deliver television station programming to their subscribers: "the section does not cover or permit a cable system, or indeed, any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public." H.R. No. 1476 at 81.

Section 111(c), 17 U.S.C. § 111(c), establishes the compliance requirements for cable systems under the plan. Those conditions include: limiting what television station signals can be retransmitted to those "permissible under the rules, regulations, or authorizations of the Federal Communications Commission," § (c)(2)(A);[2] requiring deposit of

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[2] The FCC's rules, regulations, or authorizations at the time of enactment covered both the number and type of television station signals that could be carried as well as exclusivity protection for certain types of programming. *See* 17 U.S.C. §§ 801(b)(2)(B) and (C) (providing for royalty payment adjustments under the plan for changes to the two types of

statements of account and royalty fee payments with the Register of Copyrights, § (c)(2)(B); and, mandating that delivery include both the programming itself and "any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after" the program, § (c)(3). On this last point, Congress considered that "any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system . . . significantly alters the basic nature of the cable retransmission[] service and makes its function similar to that of a broadcaster." H.R. No. 1476 at 93.

Subsection 111(d) sets out the initial royalty fees with provision for adjustment "as the Register of Copyrights may from time to time prescribe by regulation." Section 111(d)(1)(A). The royalty payment plan is hinged on "the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters," *id.* This "gross receipts" figure is used to determine the fee payment category within which individual cable systems fall and, for larger cable systems in conjunction with the distant signal equivalent value, to calculate the royalty fees owed. *See generally* 17 U.S.C. §§ 111(d)(1) (B), (C), and (D) (setting out payment calculations for different categories of cable systems). The Register of Copyrights was given authority to implement the royalty reporting and payment plan. *See* § 111(d)(1)

FCC rules); *see also* H. R. No. 1476 at 175-76 (legislative history of sections).

(requiring deposit of royalty forms and payment "in accordance with requirements that the Register [of Copyrights] shall . . . prescribe by regulation"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) (upholding Register's authority); *SBCA v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) (same).

In sum, the statutory language and the legislative history demonstrate that Congress intended Section 111 to be a comprehensive plan governing cable systems' delivery of retransmitted television station programming to their subscribers. *See, e.g.*, H.R. No. 1476 at 89 (noting cable systems use of retransmitted television signals is "based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs").

4. Cablevision's new RS-DVR service for delivering retransmitted television station programs to subscribers must be examined in the context of this comprehensive statutory plan. Section 111 specifies the prerequisites to make such delivery "subject to statutory licensing." § 111(c)(1). First, the work must be delivered to subscribers "simultaneously" with its broadcast on the television station signal. § 111(f). Second, a cable system must comply "with the requirements of subsection (d)," which sets out the reporting and payment filings to be submitted to the Register of Copyrights. § 111(c)(1). Third, a cable system's carriage of particular television station signals must be "permissible under the rules, regulations, or

authorizations of the Federal Communications Commission." *Id.* Failure to meet any prerequisite (except for non-pertinent exceptions listed in § 111(c)(4)), makes delivery of a signal "embodying a performance of display of a work [] actionable as an act of infringement." § 111(c)(2).

In addition, § 111(c)(3) makes delivery of a signal embodying a copyrighted work actionable as an infringement "if the content of the particular program in which the perform or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions." Removal or substitution of advertising in or surrounding a program "harms the advertiser and, in turn, the copyright owner whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. No. 1476 at 94. As a result, this provision "attempt[s] broadly to proscribe the availability of the compulsory license if a cable system substitutes [or removes] commercial messages." *Id.*

The statutory language reflects congressional intent that cable systems may deliver television broadcast programming only through the auspices of the compulsory licensing plan, and that delivery not in compliance with the plan's requirements is actionable as an act of infringement. Thus, and insofar as Cablevision's RS-DVR service offers to subscribers television station programming,

Cablevision's liability for copyright infringement should have been judged by the extent to which the RS-DVR service complies with the terms of the Section 111 plan.

5. The decision below did not analyze Cablevision's RS-DVR program delivery system for compliance with Section 111, despite the fact that the system proposes to deliver television station programming falling within the ambit of Section 111. *See, e.g.*, Section 111(c)(1) ("a work embodied in a primary transmission made by a broadcast station . . . shall be subject to statutory licensing . . .").

As noted, § 111(c) includes five prerequisites for delivery of an embodied work on a retransmitted signal not to be an act of infringement. It appears premature to determine whether two conditions – the reporting and payment requirements of § 111(d) – will be met as Cablevision had not yet begun operation of its RS-DVR service at the time of the decision below. Even assuming those prerequisites as well as a third one (the works are embodied on television station signals that Cablevision is authorized to retransmit) are met, the proposed RS-DVR service would run afoul of the remaining two. First, the RS-DVR system seems to be the antithesis of simultaneous delivery, which requires that the embodied work be delivered to subscribers simultaneously with the program's broadcast transmission. Instead, the RS-DVR system allows subscribers to request a work be copied during its broadcast for later delivery. *See* Pet. App. 6a ("RS-DVR users can only play content that they

previously requested to be recorded"); *see also id.* 59a-60a (more detailed explanation).

Second, delivery via the RS-DVR system appears not to include any commercial advertising or station announcements transmitted by the television station immediately before or after the program being recorded. *See* Pet. App. 58a-59a (noting that "[w]hen the time comes for a program selected for recording to run," the Arroyo server receives a request and "finds the packets for that particular program" and copies them). Such delivery contravenes the requirement of § 111(c)(3) that such advertising be delivered to subscribers along with delivery of the program. The statutory proscription against delivering a program without its adjacent advertising was intended to protect "copyright owners whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. No. 1476 at 94.

Failure to meet those prerequisites of statutory licensing means that Cablevision's RS-DVR delivery of works embodied in retransmitted television station signals "is actionable as an act of infringement." § 111(c)(3). The Second Circuit did not apply the Section 111 framework to its copyright liability analysis. That failure directly contravenes the intent of Congress to have the extent and scope of cable systems' liability for delivery of television station programming determined consistently with the plan expressly crafted to address those circumstances. Instead, the Second Circuit, though not acknowledging the precedent, followed the same

path that this Court used in *Fortnightly* and *Teleprompter*. As enactment of the 1976 Act, including the Section 111 plan, supplanted that approach to liability questions in this area, the decision conflicts with the express intent of Congress and should be rectified by this Court.

As the Second Circuit copyright liability analysis in the decision below as applied to television station programming delivered by the RS-DVR service contravenes clear congressional intent expressed in Section 111, review by this Court is appropriate. The logical extension of the decision below would lead to a result similar to the situation after *Fortnightly* and *Teleprompter*, *viz.*, that cable systems could deliver to their subscribers television station programming without incurring any copyright liability. That result would occur because the Second Circuit's analysis, in effect, replicates the *Fortnightly* and *Teleprompter* analysis for a new delivery system (substituting a centralized DVR delivery system for a centralized antenna delivery system) as controlling the copyright liability question without considering the impact of the intervening Section 111 plan on liability.[3]

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[3] The decision below also usurps the Register of Copyrights' initial role in recommending, followed by Congress' ultimate role in deciding how to treat new systems for delivering television station programming, and whether such systems fall under an existing compulsory licensing plan or should be the subject of a new plan. *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, § 109, Pub. L. No. 108–447, 118 Stat. 3394 (2004) (requiring Register to file a report with Congress that, among other things, discusses whether the current compulsory licensing plans should be modified to fit new technological developments).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Music Publishers' Association, Inc. (NMPA) respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus NMPA is a trade association representing the interests of music publishers in the United States. The approximately 800 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of United States copyrighted musical works. For nine decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts.

The licensing affiliate of NMPA—The Harry Fox Agency, Inc.—acts as licensing agent for nearly 35,000 music publishers, which in turn represent the

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, and counsel for *amicus curiae* timely notified each party's counsel of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

interests of more than 160,000 songwriters, in connection with the licensing of copyrighted musical works to make and distribute phonorecords in both physical and digital formats.

The court of appeals' ruling in this case, if not reviewed immediately, may profoundly disrupt the music industry. In particular, the decision below creates uncertainty in the place of widely shared expectations among copyright owners and distributors of musical works regarding the Copyright Act's application to interactive music services that are delivered through computers and other digital devices. Many view such digital services as the future of the music industry.

Accordingly, *amicus* and its members have a strong interest in this Court's review and reversal of the decision below to ensure that the still-nascent digital music industry is not irreversibly damaged in light of the court of appeals' destabilizing interpretation of the Copyright Act.

SUMMARY OF ARGUMENT

The effects of the erroneous interpretation by the court of appeals of the Copyright Act in this case are being felt, and will continue to be felt, far beyond the cable television industry that is litigating this case. In particular, the decision creates uncertainty in the field of interactive streaming of music to consumers over the Internet, which is a growing part of a billion dollar digital music industry. Review by this Court

and reversal of that erroneous interpretation is critical to ensure confidence and continued growth in the digital music industry.

I.

A. From the perspective of a music listener, interactive streaming of music can be analogized to a traditional jukebox. Music listeners use their computers to access online music services and select particular songs (or artists or genres of music) that they would like to hear, and their selections are immediately transmitted over the Internet and played for them on their computers through the use of streaming technology.

In order to allow the user to listen to the song, the entire musical work is transmitted by the interactive music service to the user's computer, where it is reproduced as a "buffer copy" composed of packets of data deposited in temporary computer data storage, such as RAM. The computer uses the buffer copy to play the song for the listener. Unlike downloading, streaming technology allows the song to begin playing even before all data comprising the song have been received by the user's computer.

The launch and development of interactive streaming services has been facilitated by industry understandings concerning the licensing of such buffer copies under the Copyright Act. At the same time, however, the lack of formal regulations by the Copyright Office to confirm the availability of licenses

for interactive streaming activities under Section 115 of the Copyright Act, the compulsory license provision for musical works, has been a significant impediment to the growth of interactive streaming services.

Under the Copyright Act, "phonorecords" are reproductions in the form of sound recordings (the Act uses the analogous term "copy" to refer to other types of reproductions). The Copyright Act defines "phonorecords" as "material objects in which sounds * * * are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101. In similar fashion, the Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Ibid.* The Copyright Act further provides that a work is "fixed" in a tangible medium of expression when "its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

The court of appeals below adopted a novel and flawed interpretation of the definition of "fixed" to hold that respondents' creation of buffer copies of petitioners' copyrighted television works did not

constitute the reproduction of copyrighted works "in copies." Pet. App. 10a-11a. The court appears to have ruled that data held in a computer buffer for 1.2 seconds are too "transitory" in "duration" to create "copies," Pet. App. 17a-18a, and that apparent ruling has been and will inevitably continue to be invoked to cast doubt on the status of buffer copies used to deliver "phonorecords" as well. That interpretation of the Copyright Act has the potential effect of excluding interactive music streaming from the scope of Section 115 of the Act, which provides a compulsory license for making and distributing phonorecords of nondramatic musical works. If a streamed buffer copy is not considered "fixed," mechanical licensing revenues, *i.e.*, revenues derived from licenses to make and distribute phonorecords in physical and digital formats, are directly threatened, and such revenues are an essential source of income for music creators.

B. Immediate review of the decision below is necessary to eliminate uncertainty that it has caused in pending proceedings concerning the application of the Section 115 compulsory license of the Copyright Act to digital uses in the music industry.

1. The Copyright Office has stated that it views the decision in this cable television case to be relevant to a currently pending and long awaited rulemaking in the music industry. The question of how interactive music streaming should be treated under the compulsory license provision of Section 115 of the Copyright Act has been studied by the Copyright Office for eight years. Finally, in July 2008,

the Copyright Office issued a notice of proposed rulemaking in which it concluded, after an analysis of the statutory language, case law, and its own prior interpretations, that "buffer copies meet the statutory definition of phonorecords" and therefore fit within the scope of the Section 115 license. *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 40,802, 40,809 (July 16, 2008).

The court of appeals' decision in this case was issued less than a month after the Copyright Office's proposed rulemaking. The decision caused the Copyright Office to extend the time for filing comments on its proposed rulemaking because that Office concluded that the ruling below "may be pertinent to the issues raised in this rulemaking." *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 47,113, 47,114 (Aug. 13, 2008). The Copyright Office subsequently held a public hearing on the proposed regulations, where the Register of Copyrights noted that the court of appeals' decision in this case is in tension with the Copyright Office's rationale for the proposed rule. Moreover, major Internet companies outside of the music industry, and others, invoked the decision below in their comments on the proposed music industry rulemaking to urge the Copyright Office to reverse its long-considered proposed regulations.

2. The ruling below also could have an adverse impact on a groundbreaking music industry settlement, achieved after years of costly litigation and negotiation. The Copyright Royalty Board (CRB), which is tasked under Section 115 with setting the "reasonable rates and terms" for the Section 115 compulsory license, is currently poised to adopt the settlement, which addresses the appropriate royalty rates and terms for interactive music streaming.

Nonetheless, even with the consent of all the relevant parties and the concurrence of the CRB, the court of appeals' decision could interfere with the conclusive nature of the settlement. Wireless carriers and others have challenged the settlement based on the decision below, and even if such royalty rates are finally adopted by the CRB, legal uncertainty could embolden some to disregard them as ineffective.

C. Significant current and future copyright litigation may be directly affected by the Second Circuit's erroneous decision in this case, particularly because the decision now governs in a jurisdiction that includes a major commercial center for copyrighted works. For example, a significant class action suit is pending in district court in the Second Circuit and alleges that YouTube LLC and its parent company Google Inc. have engaged in copyright infringement through their operation of a service that streams unlicensed videos that incorporate copyrighted songs. Moreover, because of the liberal venue provisions applicable to copyright actions, 28 U.S.C. § 1400(a), potential defendants would be able

to engage in forum shopping, and select district courts in the Second Circuit as the venue in which to bring actions for declaratory judgment that their buffer copies do not constitute fixed works that trigger copyright liability. The Second Circuit's decision could thus unfairly immunize interactive streamers from having to pay copyright holders the royalties that are required under the correctly interpreted Copyright Act.

II.

The decision below is based on an incorrect reading of the statute. Under the correct statutory definition of "fixed," it is the *work*—not "bits" of data that may comprise the work—that is the key to determining whether the work is fixed. A work that remains perceptible is considered to be fixed even if some of its bits have already passed through a buffer. Indeed, the overwhelming weight of authority agrees with the Copyright Office's interpretation of "fixed," most recently reflected in its notice of proposed rulemaking, which adheres to the functional definition of Section 101 of the Copyright Act in considering the ability to perceive, reproduce, or communicate a copyrighted work.

Just as importantly, the Second Circuit has created an uncertainty that will undermine existing music licensing practices and hinder private resolution of disputes as digital music distribution technologies continue to evolve. The court of appeals

adopted a novel reading of the statute and failed to limit its open-ended interpretation. This Court's immediate review is necessary to establish an acceptable degree of predictability for the digital music industry.

ARGUMENT

The court of appeals' erroneous interpretation of the Copyright Act in this case is creating uncertainty in the nascent field of interactive streaming of music to consumers over the Internet. *Amicus curiae* NMPA urges the Court to grant review of the three questions presented in the petition for a writ of *certiorari*, because each presents an issue that will have a significant and potentially irreparable impact on the future of the music industry. This *amicus* brief focuses, however, on an aspect of the second question presented which has particular importance for digital music streaming and the future of the digital music industry, *i.e.*, the repercussions of leaving unreviewed the Second Circuit's legal determination that the "buffer copies" created by respondents are not works that are "fixed," and are therefore immune from liability under the Copyright Act.

I. THE RULING BELOW THAT A "BUFFER COPY" IS IMMUNE FROM COPYRIGHT LIABILITY IN THE CABLE TELEVISION INDUSTRY HAS CREATED A STATE OF UNCERTAINTY IN THE MUSIC INDUSTRY

Digital music businesses must have access to a reliable, industry-wide copyright licensing framework that will allow them to grow their businesses. It is equally vital for music publishers and the songwriters they represent to have a means to be paid for the use by digital services of publishers' and songwriters' copyrighted musical works. The uncertainty produced by the decision below on whether "buffer copies" are immune from copyright liability threatens to undermine any licensing framework for interactive streaming, and that could have an irreversible negative impact on the legitimate music marketplace.

Immediate review of the decision below is necessary to eliminate the uncertainty it has caused in pending proceedings to determine the application of Section 115 of the Copyright Act, which is the compulsory licensing mechanism for those making and distributing copyrighted nondramatic musical works in both physical and digital form. 17 U.S.C. § 115. Major providers of Internet services, and others, are attempting to rely on the decision below to urge the Copyright Office to reverse a long-considered proposed regulation and to undermine the settled industry understandings of the role of Section 115 compulsory licensing in the digital music industry.

A. Interactive Streaming Of Music Relies On "Buffer Copies" And Thus Could Be Adversely Impacted By The Second Circuit's Decision Involving Cable Television

Interactive streaming is an increasingly important means for connecting consumers to music through the Internet. The opportunity to distribute music to individual listeners has expanded enormously with the technological innovations of the past decade, particularly with the increase of access to high-speed Internet in the home. The music industry has responded by offering a variety of methods by which individuals can obtain and listen to music through their computers and other digital devices.

Currently, the dominant model of digital delivery of music is to download a permanent digital file, for use on a computer or portable device (such as the iPod). In 2006, about 81 percent of the approximately $1.1 billion in online music services came from download services.

But there are other competing industry models for offering music to individual listeners, one of which is interactive streaming, which is usually offered on a subscriber basis. Interactive streaming of musical works based upon subscriber request is a substitute for, and displaces, the purchase of music, whether in physical formats such as compact discs, or as digital downloads. An interactive music streaming service earns income by charging a monthly fee for access to

its collection of music and/or by selling advertising space to third parties, which is displayed while a song is being heard.

From the perspective of a music listener, interactive streaming of music can be analogized to a traditional jukebox. Listeners use their computer to access online music services and select particular songs (or artists or genres of music) that they would like to hear, and their selections are immediately transmitted over the Internet and played for them through the use of streaming technology.

In order to allow the user to listen to the song, the entire musical work is transmitted by the interactive music service to the user's computer, where it is reproduced in a "buffer copy" composed of packets of data deposited in temporary computer data storage, such as RAM. The computer uses the buffer copy to play the song for the listener. Unlike downloading, streaming technology allows the song to begin playing before all data comprising the song have been received by the user's computer. *See Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 40,802, 40,808 (July 16, 2008); United States Copyright Office, Library of Congress, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act* 108 (Aug. 2001).

Leading American companies that operate interactive music streaming services include RealNetworks, Inc., MediaNet Digital and Napster, Inc. (recently acquired by Best Buy). Interactive music streaming and other types of digital music services are expected to grow dramatically in the coming years.[2]

The launch and development of interactive streaming services has been facilitated by industry understandings that the buffer copies made by such services in the streaming process are "digital phonorecord deliveries" subject to compulsory licensing under Section 115 of the Copyright Act. The lack of confirmation of such industry practice through formal rulemaking by the Copyright Office, however, has been an impediment to the rapid growth of such services, owing to lingering doubts concerning the applicability of the Section 115 license.

Under the Copyright Act, "phonorecords" are reproductions in the form of sound recordings (the Act uses the analogous term "copy" to refer to other types

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[2] *See, e.g.*, Jefferson Graham, *Music service Rhapsody's not afraid to take on iPod*, USA Today (Aug. 5, 2008), *available at* http://www.usatoday.com/tech/products/2008-08-05-rhapsody-music-online_N.htm (analyst "forecasts $600 million in U.S. subscription sales by 2012," of which interactive streaming is a subset "up from $235 million in 2007"); Brad Cook, *TMO Reports—Analyst Sees Subscription-Based Music Services Eclipsing Pay-Per-Download*, Mac Observer (May 17, 2005), *available at* http://www.macobserver.com/article/2005/05/17.12.shtml.

of reproductions). Section 115 provides that once phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may obtain a compulsory license to make and distribute phonorecords of the work at a statutorily prescribed royalty rate so long as that person's primary purpose is to distribute them to the public for private use. 17 U.S.C. § 115(a). As amended by Congress in the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 344-345, the Section 115 compulsory license includes the right to make and distribute not just physical phonorecord products such as compact discs, but also phonorecords "by means of a digital transmission which constitutes a digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(A).

"Phonorecords" are defined as "material objects in which sounds" are "fixed" by any method "now known or later developed," and "from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101. In similar fashion, the Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Ibid.* The Copyright Act further provides that a work is "fixed" in a tangible medium of expression when "its

embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

The Second Circuit in the decision below applied a novel and flawed interpretation of the definition of "fixed" to hold that respondents' creation of buffer copies of petitioners' copyrighted television programming did not constitute reproduction of copyrighted works "in copies" and was thus immune from liability under the Copyright Act. Pet. App. 10a-11a. The court appears to have ruled that data held in a computer buffer for 1.2 seconds are too "transitory" in "duration" to create such "copies." Pet. App. 17a-18a. That apparent ruling has been and will inevitably continue to be invoked to cast doubt on the status of buffer copies used to deliver music "phonorecords" for purposes of excluding them from the Section 115 compulsory license altogether.

The century-old compulsory copyright license embodied in Section 115 that requires payment for use of copyrighted nondramatic musical works represents a careful and unique balancing of interests among musical work owners, music distributors and music consumers that Congress has entrusted the Copyright Office to administer. Because of the displacement of traditional music sales by interactive music streaming services, a reading of the Copyright Act that would have the potential effect of excluding interactive music streaming from the scope of Section 115 because a streamed buffer copy used to play a

musical work is somehow not considered "fixed" poses a substantial threat to mechanical licensing revenues, *i.e.*, revenues derived from licenses to make and distribute phonorecords in physical and digital formats, which are an essential source of income for music creators.[3]

B. The Decision Below Has Disrupted Rulemaking By The Copyright Office Regarding Copyright Licenses For Interactive Music Streaming That Was Coming To A Conclusion After Eight Years Of Study And Deliberation

The question of how interactive music streaming should be treated for purpose of the compulsory license embodied in Section 115 of the Copyright Act has been studied by the Copyright Office for eight years. The absence of an express rule confirming that licenses are available under Section 115 for the use of musical works by digital services offering interactive streams and the attendant uncertainty about that licensing availability has been detrimental to the

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[3] The preservation of mechanical licensing revenues was a primary concern of Congress in amending Section 115 to extend to digital transmissions of musical works. *See, e.g.*, S. Rep. No. 104-128, at 17 (1995) (in amending Section 115 to include DPDs, Congress wished to avoid "even a perception of uncertainty," and thus sought to "clarify[ ] and confirm[ ]" the mechanical rights of music copyright owners in the digital environment); H.R. Rep. No. 104-274, at 28 (1995) (purpose of DPD amendments was to "confirm" mechanical rights in context of digital transmissions).

music industry. An industry consensus has emerged, however, and it is supported by the Copyright Office, which has a long-standing interpretation of "fixed" on which it has relied to propose critical regulations for the music industry. The Second Circuit's opinion, if unreviewed, could unsettle all of that.

1. The Copyright Office first began considering the issue of what types of digital transmissions of prerecorded music are "digital phonorecord deliveries" subject to a compulsory license under Section 115 of the Copyright Act in 2000. *See* 73 Fed. Reg. at 40,803 (discussing history of proceedings). The Copyright Office issued two notices of inquiry in 2001 to collect evidence regarding technology and industry practices. *See id.* at 40,805. Following a series of significant industry developments, the Copyright Office conducted a public roundtable in June 2007 to refresh the record in anticipation of issuing a rule concerning the scope of the Section 115 compulsory license in relation to digital music services. *Ibid.* More than 20 organizations and companies representing copyright owners, songwriters, record companies, online music services and others participated in the 2007 roundtable. *Ibid.*

Finally, in July 2008, the Copyright Office issued a Notice of Proposed Rulemaking. The Copyright Office explained that "the continued legal uncertainty associated with operating music services in the current marketplace * * * highlight[s] the need to resolve the outstanding questions concerning which

reproductions of phonorecords made during the course of a stream fall within the scope of the statutory license and which, if any, do not." *Id.* at 40,806. The Copyright Office noted that such uncertainty "contributed to the current crisis in the music industry, due to the difficulty of obtaining licenses for all the rights required in order to offer various online music services in an environment in which it is not always apparent which rights must be cleared and how one can obtain them." *Ibid.* The Office concluded, after an analysis of the statutory language, case law, and its own prior interpretations, that "buffer copies meet the statutory definition of phonorecords" and thus fit within the scope of the Section 115 license. *Id.* at 40,809.

The intervening court of appeals' decision in this case has substantially undermined that progress on the Copyright Office's resolution of those issues. The Copyright Office had relied on decisions from other circuits that treat temporary computer reproductions as sufficiently fixed to constitute copies under the Copyright Act. *Id.* at 40,808 (citing *DMCA Section 104 Report*, *supra*, at 107-129 (collecting judicial authorities)). But after issuance of the decision in this case, the Copyright Office extended the time for filing comments because it concluded that the ruling of the court below "may be pertinent to the issues raised in this rulemaking." *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 47,113, 47,114 (Aug. 13, 2008).

The Copyright Office then held a public hearing on its proposed regulations, where the Register of Copyrights noted that the Second Circuit decision was in tension with the Copyright Office's proposed approach. Transcript of Copyright Hearing at 5 (Sept. 19, 2008), *available at* http://www.copyright.gov/docs/section115/2008/rm_2000-7_hearing_transcript_9.19.08.pdf; *see also id.* at 2 (decision "put into question some of the premises on which our proposed rule was based"). Accordingly, despite its determination that regulatory clarification about the applicability of the compulsory license to digital music streaming would benefit the industry, the Copyright Office has yet to issue a final rule.

In addition, opponents of the Copyright Office's proposed regulation—including Verizon Communications, CTIA-The Wireless Association, the National Association of Broadcasters, the Ad Hoc Coalition of Streamed Content Providers (which is, in reality, Google, Inc., and its subsidiary YouTube LLC)—relied heavily on the decision below in written comments to oppose the proposed regulation's treatment of interactive music streaming for compulsory licensing.[4] By contrast, like the Copyright Office, all of the key stakeholders within the music industry—music publishers and songwriters, record

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[4] These comments are available on the Copyright Office's website at http://www.copyright.gov/docs/section115/comments-3 and http://www.copyright.gov/docs/section115/comments-3/reply.

labels and digital music companies—support the treatment of interactive streams as "digital phonorecord deliveries" within the Section 115 license.

2. The ruling below also may have an adverse impact on a groundbreaking music industry settlement, achieved after years of costly litigation and negotiation.

The Copyright Royalty Board (CRB), which consists of Copyright Royalty Judges appointed by the Librarian of Congress, is charged under Section 115 with setting the "reasonable rates and terms" for the Section 115 compulsory license, including for digital uses. 17 U.S.C. § 115(c)(3)(D). The CRB commenced a proceeding in January 2006 to determine such rates and terms. *See Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, 71 Fed. Reg. 1454 (Jan. 6, 2006). *Amicus* NMPA is a participant in those proceedings. After all of the participants had submitted written statements and oral testimony, and following a lengthy and intensive process of negotiation, NMPA and the other parties informed the CRB that they had reached a groundbreaking settlement regarding the appropriate royalty rates and terms for interactive music streaming. *See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, 73 Fed. Reg. 57,033 (Oct. 1, 2008) (proposed to be codified at 37 C.F.R. pt. 385).

This settlement represents the culmination of a long series of industry negotiations and understandings to clarify and resolve concerns surrounding the treatment of interactive streaming under the Section 115 compulsory license, as well as the intermediate copies required to facilitate these types of digital transmissions. Notably, the royalty rates and terms to which the parties agreed and which are embodied in the settlement are consistent with and would be supported by the Copyright Office's proposed regulations.

The Copyright Act authorizes the CRB to adopt such negotiated rates and terms on an industry-wide basis so long as the CRB concludes, based on the record before it and after a period of notice and comment, that the agreement provides a reasonable basis for setting statutory terms and rates. 17 U.S.C. § 801(b)(7)(A)(i) & (ii). After the conclusion of the notice and comment period, the CRB is expected to issue a final regulation containing the royalty rates and terms for interactive music streaming.

Nonetheless, even with the consent of all the relevant parties and the concurrence of the CRB, the Second Circuit's decision could interfere with the conclusive nature of the settlement. Wireless carriers and broadcasters who were not parties to the CRB proceeding have challenged the settlement based on the decision below. *See* Comments of the CTIA-The Wireless Association and The National Association of Broadcasters, at 14-15, Docket No. 2006-3 (Copyright Royalty Bd. Oct. 31, 2008). Further, even if such rates

are finally adopted by the CRB, the legal uncertainty could embolden some to disregard them as ineffective.

By contrast, reversal of the Second Circuit's erroneous interpretation of the Copyright Act would remove any residual doubts about the broad availability of compulsory licenses for interactive streaming of musical works under Section 115.

C. The Second Circuit's Decision May Affect Copyright Infringement Litigation Pending In The Second Circuit, And Will Lead To Forum Shopping

Current and future copyright litigation may also be directly affected by the Second Circuit's decision, particularly because the decision now governs in a jurisdiction that includes a major commercial center for copyrighted works.

Amicus NMPA is a plaintiff representing its music publisher members in a pending class action suit alleging that YouTube LLC and its parent Google Inc. have engaged in massive copyright infringement through their operation of a service that streams unlicensed videos that incorporate copyrighted songs. *See Football Ass'n Premier League Limited v. YouTube, Inc.*, No. 07-03582 (S.D.N.Y. filed May 4, 2007), *available at* http://www.youtubeclassaction.com/courtdox/2007-11-07YTAmdCplt.pdf. This enormous class action, in which copyright holders from the music, sports, news, and entertainment industries have come together to prohibit unauthorized

reproduction and performance of their copyrighted works through YouTube, could potentially be affected by the Second Circuit's erroneous holding in ways that would never be undone.

Further, because of the liberal venue provisions applicable to copyright infringement actions, 28 U.S.C. § 1400(a), potential defendants will be able to forum shop and select district courts in the Second Circuit to bring actions for declaratory judgment that their RAM buffer copies do not constitute fixed works that trigger copyright liability, in the hope that they will benefit from the uncertain boundaries of the new requirements for a work to be considered fixed. Aside from the enormous toll it would take on music publishers and songwriters to litigate such actions, the Second Circuit's decision could unfairly immunize interactive streamers from having to pay copyright holders the royalties that are required under a correct interpretation of Section 115 compulsory license.

II. The Court Of Appeals Reached A Wrong Conclusion And Did So In A Manner That Casts A Shadow Of Uncertainty Over Necessary Private Negotiations In The Music Industry

The decision below is based on an incorrect reading of the statute. And that erroneous interpretation creates uncertainty that will undermine existing licensing practices and hinder

private resolution of current and anticipated disputes as digital distribution technologies continue to evolve. This Court's immediate review is necessary to establish an acceptable degree of predictability for the legitimate digital music industry, which is already severely tested by the challenges of online piracy.

RAM buffer copies created by interactive streaming services in order to play back musical works for users are "phonorecords" as defined by Section 101 of the Copyright Act because the buffer copies are material objects in which sounds are "fixed" and "from which the sounds can be perceived, reproduced, or otherwise communicated, either with the aid of a machine or device." 17 U.S.C. § 101.

Such buffer copies manifestly meet the definition of "fixed" in Section 101, because the musical work exists in a sufficiently stable form to be perceived, reproduced, and communicated in its entirety. This interpretation is consistent with the overwhelming weight of authority, which agrees with the Copyright Office's interpretation of "fixed," and which adheres to the functional definition of Section 101 in considering the ability to perceive, reproduce or communicate a copyrighted work. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998); *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1177-1178 (N.D. Ill. 1997); *DMCA Section 104*

Report, *supra*, at 118-122 (collecting additional judicial authorities).

The court of appeals below rejected that consistent interpretation of other courts and the longstanding interpretation of the Copyright Office, on which the Copyright Office has relied most recently to propose critical regulations for the music industry on compulsory licensing in the digital music streaming context. Further, in adopting its novel reading of the Copyright Act, the court of appeals failed to establish any principles to limit its unsettling and open-ended ruling.

In determining that data held in a computer buffer for 1.2 seconds cannot give rise to an actionable "copy," the court of appeals misconstrued the statutory definition of "fixed" on which it relied. Section 101 provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Under the statutory definition of "fixed," it is the *work*—not any "bits" of data that may comprise the work—that is the key to determining whether the work is fixed. A work that remains perceptible is considered to be "fixed" even if some of its "bits" have already passed through a buffer.

The Second Circuit's contrary interpretation has left the music industry in an untenable position. A lack of certainty concerning the ready availability of

licenses for the reproductions required for the process of interactive streaming will inhibit the growth of legitimate digital music services and threaten the livelihood of music creators. The court of appeals' suggestion that its ruling is somehow fact specific, Pet. App. 17a, provides no useful guidance and only highlights the uncertainty engendered by the decision that will surely impede the private resolution of licensing issues in the digital music industry.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC. and
CABLEVISION SYSTEMS CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE THE PICTURE ARCHIVE COUNCIL OF AMERICA, INC., THE ENTERTAINMENT SOFTWARE ASSOCIATION, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., THOMAS D. SYDNOR II, DIRECTOR OF THE CENTER FOR THE STUDY OF DIGITAL PROPERTY AT THE PROGRESS & FREEDOM FOUNDATION, AND THE PROPERTY RIGHTS ALLIANCE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE[1]

The Picture Archive Council of America, Inc. is a non-profit organization of 150 stock photography libraries and agencies worldwide which license millions of images, illustrations, film clips, and other works protected by the Copyright Act (the "Act"), 17 U.S.C. § 101 *et seq.*, to newspapers, magazines, television companies, and others on behalf of thousands of individual authors, creators, and owners of those works, in return for appropriate license fees.

The Entertainment Software Association is a nonprofit trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet.

The American Society of Media Photographers, Inc. ("ASMP") is a trade association for professional photographers who make photographic images, primarily for publication. ASMP promotes photographers' rights through industry, judicial, and legislative advocacy; information and publications; and education. ASMP was founded in 1944 and has more than 5,000 members worldwide. ASMP has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Thomas D. Sydnor II is Director of the Center for the Study of Digital Property at The Progress and Freedom Foundation, a non-profit, 501(c)(3) educational foundation, which studies and provides educational information on the impact of digital and electronic media on public policy.

Property Rights Alliance is a project of Americans for Tax Reform, a 501(c)(4) tax exempt organization that represents the interests of American taxpayers at the federal, state, and local level. It seeks to emphasize the importance of maintaining private property rights, both physical and intellectual in nature, as well as highlighting the relationship between effective property rights law and economic development.

Amici support the petition for a writ of certiorari to review the Second Circuit's decision because of its importance to virtually all authors and owners of copyrighted works which make them available to the public for educational, informational, and entertainment purposes, particularly those who depend upon licensing fees and royalties for their livelihood and to support the creation of new works.

It is important to address the issues now because of the widespread and growing use of networked computer systems over the internet and closed systems for delivery of motion pictures, television programming, internet and home computer gaming software, entertainment and educational software, other audiovisual works, sound recordings, literary works, books, newspapers, periodicals and other copyrighted works.

SUMMARY OF ARGUMENT

The Second Circuit erroneously reversed the careful decision of the district court, Pet. App. 43a, that Respondent Cablevision would be liable as a direct infringer of petitioners' copyrighted television programs and motion pictures.

The district court recognized that Cablevision developed and plans to operate an elaborate computer system to make multiple unauthorized copies of petitioners' works and transmit them for public performance to Cablevision's subscribers at their request, making it a direct infringer of petitioners' exclusive rights. 17 U.S.C. §§ 106 and 504.

The Second Circuit reversed, using a pinched construction of the Act to reach faulty conclusions. It concluded that only Cablevision's subscribers are "doing" the copying under its "volitional conduct" test, that copies in buffers in Cablevision's system are not copies because they fail to meet a novel "durational" test, and that the concededly unauthorized transmissions of petitioner's programming to Cablevision's subscribers "do[] not involve the transmission of a performance '*to the public*.'" Pet. App. 12a-18a, 22a-24a, and 28a-39a (emphasis added).

The court of appeals disregarded the fact that Cablevision designed and will operate its closed system for the sole purpose of making unauthorized copies and making public transmissions of petitioners' copyrighted works to its subscribers. *Id.* at 20a. No issues are presented concerning liability for secondary or

contributory infringement, or the defense of fair use under 17 U.S.C. § 107.

The Second Circuit misinterprets the term "fixed," 17 U.S.C. § 101, and reads into it a new "durational requirement." Section 101 provides that a work is "fixed" in a tangible medium "when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." By interpreting the phrase "for a period of more than a transitory duration" as a separate requirement, the Second Circuit has rewritten the Act in a way that will have long-term repercussions for authors and content owners.

The Second Circuit similarly misinterprets the Act's definition of public performance. Section 101 explains that "to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." The Second Circuit erroneously concludes that Cablevision's intended transmissions of unauthorized copies of petitioner's works to its subscribers are not "to the public."

The Court should grant the Petition because of the importance of the issues raised under the Act and because of conflicts with decisions of this Court and of other circuits.

Modern systems for distribution of digitally encoded copyrighted works—whether filmed, recorded, or written—depend on those responsible for running the distribution system to pay the authors or owners of the copyrighted works to license and use them. The Second Circuit's ruling threatens that entire system because it allows those operating such systems to evade license fees and liability as direct infringers altogether by simply claiming that only their customers are "doing" the infringing acts and only they are responsible for any direct infringement.

Cablevision has not yet begun operation of its so-called "Remote Storage DVR System." If left undisturbed, the court of appeals' erroneous decision creates strong legal incentives for Cablevision and others to create comparable systems for wholesale copying, dissemination, and performance of copyrighted works without license or compensation to their authors. Other distributors of copyrighted works will rely upon the Second Circuit's contorted conclusion that liability under the Act falls only on end-users. Given the speed of adoption of new computer technologies, such systems will undoubtedly spread like wildfire.

Copyright owners should not be reduced to pursuing infringement claims against individual end users. The financial markets' recent convulsions demonstrate that subdividing risks into small widely dispersed increments only delays injury when their cumulative effects rock the entire system. The Court should address the issues presented by this technology now, while it is in its infancy, to avoid the wholesale and perhaps irreparable infringements that will result.

Almost all authors and owners of copyrighted works, and their licensors, including the members of the *amici* herein, are therefore at risk of massive infringements by the development and use of closed systems like Cablevision's, or similar systems over the internet. The Court should grant review and establish Cablevision's liability as a direct infringer before such infringing systems become pervasive and virtually impossible to shut down.

STATEMENT

A. Cablevision Designed and Will Operate A Closed Computer Server System for the Sole Purpose of Making Unlicensed Copies of Petitioners' Copyrighted Works.

Cablevision is a cable-television operator which provides television and motion picture programming to its subscribers through set-top boxes for television sets, set-top digital video recorders, and a video on demand system. Cablevision pays license fees to the authors or owners of these copyrighted works for these various types of uses pursuant to the compulsory license for secondary transmissions of signals from specified broadcast television stations, 17 U.S.C. § 111, and under negotiated license agreements for Cablevision's transmission of other specific types of content and uses, including any right to make copies, delay, or modify transmissions. *See* Pet. 5.

Cablevision announced in March 2006 that it would begin offering a new service – "Remote Storage DVR System" (the "System") – to its subscribers for an

additional fee. The System would allow Cablevision subscribers to use their home remote control device, also provided by Cablevision, to request that Cablevision make copies of television and motion picture programming on Cablevision's System and retransmit this programming later upon request.

Neither Cablevision's compulsory license, 17 U.S.C. § 111, nor its negotiated license agreements authorize Cablevision to make copies and transmit performances of the works under its new System. Pet. App. 46a. Cablevision does not intend to seek further authorization or to further compensate the authors and owners of these works for these additional uses. *Id.* at 44a.

B. Cablevision Will Make Unauthorized Copies and Transmit Public Performances Requested by its Subscribers.

Cablevision deliberately created and designed the System in such a way that it could argue that it is not directly responsible for the unauthorized copying and performance of copyrighted television and motion picture works.

Cablevision's System consists of a large computer system designed to make and store an individual copy of television and motion picture programming for each of its subscribers who requests that Cablevision make such a copy prior to or when this programming is delivered live over the cable network system.

Under the Second Circuit's novel ruling, this massive copying of petitioners' copyrighted works is not being "done" by Cablevision, despite the fact that the unauthorized "copies," Pet. App. 26a-27a, as defined in the Act, 17 U.S.C. § 101, are made using machinery not located in its subscribers' homes, but instead on Cablevision owned-premises and stored on the physical hard drives and other equipment within Cablevision's System.[2]

For those copies to arrive in Cablevision's servers, Cablevision diverts the live television cable signal through a series of computer buffers. First, a complete copy of all programs on all channels are stored in a buffer for a brief period of time. That buffer transmits an entire copy of the programming to a buffer in a separate server (the "primary ingest buffer"). The primary ingest buffer identifies whether any subscriber has requested copying of the programming and transmits a copy of any selected programs to a second buffer within the server. There, duplicate copies are generated for each customer and transmitted to multiple hard drives in Cablevision's System, where a copy of each requested program is fixed, for later transmission to each requesting subscriber. Pet. App. 5a.

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[2] The Second Circuit, Pet. App. 21a, made distinctions between human actions and acts of machines that Congress long ago rejected. H.R. Rep. No. 94-1476, at 52 (1976) ("it makes no difference what the form, manner, or medium of fixation may be . . . and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'").

Cablevision's subscribers use Cablevision's supplied remote control to request that Cablevision transmit the selected copyrighted works from the copies made by Cablevision on its hard drives. The Second Circuit's opinion focused solely on whether this transmission of individual programs from Cablevision's hard drives to its subscribers for viewing constituted a performance "to the public." The Second Circuit did not analyze whether the transmissions of individual programs from the first buffer to the second buffer, or from the second buffer to the hard drives, supposedly controlled only by subscribers, also constituted a performance "to the public." Pet. App. 41a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Analysis and Conclusions Are Contrary to Decisions of This Court and Conflict with Other Circuits.

This case requires examination of fundamental principles under the Act. "*Anyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . ." 17 U.S.C. § 501(a) (emphasis added). The district court, Pet. App. 72a, correctly held that Cablevision would be liable as a direct infringer for its own acts in making unauthorized copies of petitioners' copyrighted works in buffers and on hard disks in Cablevision's System and for "perform[ing] the copyrighted work[s] publicly . . ." in violation of petitioners' "exclusive rights to do and to authorize . . ." such acts. *Id.* at § 106(1) and (4). The Second Circuit erroneously reversed.

Copyright infringement is a strict liability statutory tort; intent to infringe is not required, only an act by Cablevision in violation of petitioners' exclusive rights. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) (applying 1909 Copyright Act); 3 *Patry on Copyright* § 9:5 at 9-19 (2008). The fact that a third party requests you do an act in violation of Section 106 does not protect you from liability as a direct infringer; if you perform the act, you are a direct infringer. *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1113 (2d Cir. 1986) (printer of infringing book made at request of third party liable as direct infringer, even if innocent). Here, the Second Circuit inappropriately reads a "volitional" requirement into Section 501(a), relying upon internet service provider cases that have no bearing here, Pet. App. 19a-22a, disregarding prior Second Circuit precedent, and implicitly inserting an intent requirement into the Act where none exists.

The Second Circuit erroneously concludes that this case is governed by *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony Betamax*") by analogizing Cablevision's elaborate System to a simple, consumer-owned and controlled Betamax or VHS machine. The court of appeals disregarded this Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), which held that publishers and online providers of copyrighted works were direct infringers, even though the subscribers to the online services actually initiated the viewing and any copying of the unauthorized works on the website. The Second Circuit also failed to appreciate the significance of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 543 U.S. 913 (2005), in

evaluating Cablevision's conduct here (even though *Grokster* was presented as a contributory, not direct infringement case).

The Second Circuit's analysis of "copying" and transmission of public performances is also contrary to the decisions of other circuits, as explained below and in the Petition.

II. The Case Presents Vital Issues Concerning the Direct Liability Under the Copyright Act of Parties Who Create and Operate Computerized Systems Which Make Unauthorized Copies and Transmit Public Performances of Copyrighted Works.

The digital revolution and the emergence of the internet continue to present new challenges for protection of the exclusive rights of authors and owners of copyrighted works under the Act. Following *Sony Betamax*, a series of cases have involved systems created to evade liability under the Act for infringement. *See Grokster*, *supra*; *Tasini*, *supra*; *In re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 543 U.S. 1180 (2005); *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

Cablevision's System is a giant step backwards to such earlier attempts to feast on copyrighted works without compensating their authors and owners. The System is not remotely comparable to Sony Betamax machines, as Cablevision contends. It is a closed system operated and controlled by Cablevision. It has no purpose or function other than diverting unauthorized

public performances of petitioners' copyrighted works to its System, where Cablevision then makes and stores multiple unauthorized copies for later transmission of unauthorized performances "to the public," *i.e.*, its subscribers.

In *Grokster* and *Napster*, the courts invalidated efforts by enterprising infringers which were costing copyright authors and owners dearly. But the years required to determine the illegality of such systems delayed the commercial impetus to develop and introduce legitimate systems. Subsequently, companies such as Apple Inc. and others developed legitimate systems for efficient and inexpensive delivery of copyrighted works such as *iTunes* and *Rhapsody*, eventually meeting consumers' desires and protecting copyright authors' and owners' rights and livelihoods. The delay substantially damaged the American and worldwide music recording industry and musical artists.

The television, photography, video game and publishing industries should not have to suffer the same delay in resolving the basic issue of who is primarily responsible for unauthorized use of copyrighted works which is vividly presented by Cablevision's System. If the owners and operators of comparable computer systems can avoid direct liability by blaming their end users for any infringement, presumably they will, like Cablevision, seek to avoid contributory or vicarious liability by claiming that the non-commercial end users are engaged in fair use. Such a conclusion would render irrelevant the entire notice and takedown mechanism established by the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c) ("DMCA").

The Court should therefore address the issues presented in this case now. Absent review, Cablevision's System will be implemented not only by Cablevision, but will provide a template for others to follow. Yao, Deborah, *Cable, Led By Cablevision, Mulls Network DVR*, USA Today, Sept. 19, 2008.[3] The Second Circuit's decision provides a roadmap for distributors of copyrighted content in a broad range of industries to develop comparable systems protected from liability for direct infringement. Such systems will affect authors and owners of photographic images, video games, sound recordings, and digital copies of literary works, including books, magazines, newspapers, and software owners and developers.

The Second Circuit's decision restricts direct infringement of copyrighted works to tiny increments, as the only people liable for infringement are individuals at home in their basements and TV rooms. As with the

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[3] Some less elaborate systems have been attempted on the internet, and there have been or are cases pending in the district courts involving websites and software of parties similarly seeking to avoid infringement liability for storing music recordings in individual internet "lockers," *Capitol Records, Inc. v. MP3 Tunes, LLC*, 07 Civ. 9931 (S.D.N.Y.), posting unauthorized scanned copies of current magazines, *Time, Inc. v. Budd*, Docket No. 08-cv-7392 (S.D.N.Y.), unauthorized transmissions of television programming over the internet, *Twentieth Century Fox Film Corp. v. iCraveTV*, 2000 WL 255989 (No. Civ. A 00-120, 00-121) (W.D. Pa. Feb. 8, 2000) (granting preliminary injunction), and retransmitting live internet webcasts of racing events without authorization. *Live Nation Motor Sports, Inc. v. Davis*, 2007 WL 79311 (06-CV-276-L) (N.D. Tex., Jan. 9, 2007).

securitization of mortgages, if only a multitude of individual infringers are liable, that increases the risk that copyright owners' rights cannot be effectively and inexpensively protected. In fact, the Act provides direct remedies against those who institute or have the ability to control such infringements.

The Court should grant the Petition now because the Court has the opportunity to address the legality of Cablevision's new System prior to its actual implementation. If the Court does not address the issue now, infringing technologies could become entrenched throughout the television and other copyright-based industries. Given the increasing speed by which infringing technologies have been created and used, stopping the System before it is rolled out is imperative.

Those who create, operate and benefit from these systems should not be allowed to escape responsibility for their own acts of infringement by blaming their subscribers.

III. The Second Circuit's Conclusion That Cablevision Would Not Be a Direct Infringer Misconstrues the Plain Language of the Copyright Act.

The Act provides that "[*a*]*nyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . of the author." 17 U.S.C. § 501 (a) (emphasis added). Under Section 106 (a)(1) and (4), "the owner of copyright . . . has the exclusive rights

to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies . . ." and (4) "in the case of literary, musical, dramatic, and choreographic works, and pantomimes, and motion pictures and other audiovisual works, perform the copyrighted work publicly . . ." (emphasis added).

The Second Circuit disregarded this plain statutory language and renders Cablevision immune from direct liability by concluding that end-users could "authorize" Cablevision to perform these actions. As the district court correctly held, the following actions carried out by Cablevision's system render it liable as a direct infringer of petitioners' copyrights: (1) making copies on Cablevision's System hard drives; (2) making copies of portions of petitioners' works in temporary data buffers en route from Cablevision's live feed television signal to its System; and (3) transmitting unauthorized performances of petitioners' works to the public, *i.e.*, Cablevision's subscribers. Pet. App. 44a-45a.

Cablevision's actions are not authorized under either compulsory or negotiated licenses; Cablevision is a direct infringer.

IV. The Second Circuit Misconstrues the Definition of Copying in the Copyright Act by Concluding that Neither the Unauthorized Buffer Copies Nor the Hard Disk Copies Made by Cablevision's System Are Infringing.

The Act defines "[c]opies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101.

The Second Circuit erroneously concluded that the buffer copies were not infringing because they did not meet a supposed overall "durational" requirement in the definition of "fixed" in the Act. 17 U.SC. § 101. Pet. App. 18a. The lower court's conclusion is based upon misconstruction of the first sentence of the definition and disregard of the second sentence. The first sentence provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Though the portion of the work stored in the buffers is for only a few seconds, that is "sufficiently permanent or stable to be perceived, reproduced, or otherwise communicated . . . ," *id.*, because the signal continues on in Cablevision's System where they are "fixed" as "copies" for indefinite storage on its hard drives.

The Second Circuit misread the Act's definition of "fixed" to mean that the phrase "for a period of more than transitory duration" modifies not only the term "communicated," but also the terms "reproduced" and "perceived." This construction does not make grammatical sense and violates the "last antecedent" principle of statutory construction. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005) (recognizing that a limiting clause or phrase ordinarily modifies only the noun or phrase that it immediately follows under the rule of the "last antecedent").

In addition, the second sentence of the definition of "fixed" provides that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if "a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101. Here, Cablevision makes multiple copies of petitioners' works on its hard drives simultaneously with their transmission through the buffer. Pet. App. 5a.

The Second Circuit's decision conflicts with other circuits. In *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), the Ninth Circuit held that, where stored data is capable of being "perceived, reproduced, or otherwise communicated," even if only temporarily, it has been embodied long enough to be "fixed" under the Act. This approach has been adopted by other circuits and followed in district courts. *Storage Tech. Corp. v. Custom Hardware Eng. & Consulting, Inc.*, 421 F.3d 1307, 1311 (Fed. Cir. 2005); *Stenograph L.L.C. v. Bossard Assoc. Inc.*, 144 F.3d 96, 101-102 (D.C. Cir. 1998); *accord, Marobie-FL, Inc. v. National Assoc. of Fire*

Equip. Distr. and Northwest Nexus, Inc., 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997); *In re Indep. Serv. Org. Antitrust Litigation*, 910 F. Supp. 1537, 1541 (D. Kan. 1995); *Adv. Comp. Serv. of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 364 (E.D. Va. 1994).

Here, various layers of digital buffer copies remain stored in Cablevision's System long enough for Cablevision to copy and transmit them upon its customers' requests. This falls squarely within the *MAI Systems* rule. The Second Circuit erroneously held the buffer copies were not "fixed" by concluding that its novel "durational requirement" was not at issue in *MAI Systems* and its progeny. Pet. App. 13a. This conflict in the circuits requires resolution now.

The Second Circuit concluded that the buffer copies, which Cablevision conceded it "made," do not constitute a "copy" under the Act. The conclusion that Cablevision is not a direct infringer thus depends on the fiction that it is Cablevision's subscribers who would be "doing" the copying on Cablevision's hard drives. Pet. App. 26a-27a. This flies in the face of reality and the plain language of the Act because it reads a "volitional requirement" into the Act – improperly requiring proof of intent in a strict liability tort.

Cablevision created its expensive and sophisticated System for the sole purpose of making copies of petitioners' works, storing them, and retransmitting public performances of them to its subscribers for a fee, while attempting to evade its obligation to obtain authorization from petitioners to do so and to pay them

any agreed compensation for these additional uses of petitioners' works.

This System is owned, operated, and subject to the exclusive control of Cablevision, not its subscribers. Cablevision chooses the content which it permits to be copied, replicates the data stream containing the television programs and the motion picture content, and transmits those streams from its primary ingest buffer to the multiple hard drives in its servers, where each of the multiple data streams is stored. Cablevision later transmits the various copies from Cablevision's hard drives to subscribers upon request. No transmission can occur unless Cablevision chooses to, and then makes it happen, regardless of its subscribers' requests.

Copyrighted works are incorporeal, but "copies" under the Act are physical objects, 17 U.S.C. § 101. It is Cablevision which "makes" unauthorized copies of the works by transmitting them in a data stream and making "copies" on the hard drives in its System.

The district court correctly rejected Cablevision's argument that its System is the functional equivalent of a Sony Betamax machine, a contention which verges on the frivolous, given the complexity of Cablevision's System and the fact that it is under Cablevision's dominion and control. Pet. App. 67a. Individual consumers purchase, own, and completely control the operation of home copying machines such as the Sony Betamax. Such machines are staple articles of commerce which have substantial non-infringing uses and are completely controlled by their owners. *Sony Betamax, supra.*

Cablevision unlawfully siphons off copyrighted works from live television streams and makes unauthorized copies on Cablevision's System. Cablevision then transmits unauthorized performances of those works from its unlawful hard disk copies to its subscribers – members of the public – upon request.

Subscribers do not purchase a machine which they own and control, as in *Sony Betamax*; Cablevision makes copies on its System and transmits the public performances from that System to its subscribers, upon request. These acts by Cablevision violate its compulsory license, 17 U.S.C. § 111, and its negotiated agreements with petitioners, and constitute direct infringement. 17 U.S.C. § 501(a). This takes place without any compensation to petitioners for these additional uses of their copyrighted works.

V. The Second Circuit Misconstrues the Definition of Public Performance by Concluding That Cablevision's Unauthorized Transmission of Petitioners' Copyrighted Works to Cablevision's Subscribers From Its System's Hard Disks Is Not a Performance "To the Public."

Cablevision would also infringe petitioners' exclusive right of public performance by transmitting public performances of petitioners' copyrighted works from the copies fixed on the hard drives in Cablevision's System, 17 U.S.C. §§ 101, 106(a)(4), 504, as the district court correctly held. Pet. App. 79a-80a.

The Second Circuit erroneously held that Cablevision would not infringe petitioners' performance

right because it concluded that playing the programming from Cablevision's System hard disks "does not involve the transmission of a performance 'to the public.'" Pet. App. 28a.[4] *See* 17 U.S.C. § 101.

Cablevision designed a system that clearly transmits "a performance" of petitioners' works, upon request of its subscribers. 17 U.S.C. § 101 ("To 'transmit' a performance or display is communicated by any device or a process whereby images or sounds proceed beyond the place from which they are sent.").

Cablevision's transmission of petitioners' works satisfies the definition of "[t]o perform or display the work publicly . . . ." 17 U.S.C. § 101. This is clear from the plain language of the Act and its legislative history. The definition of a public performance in the "transmit" clause includes "to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *Id.*

In a unanimous opinion by Justice Brandeis in *Buck v. Jewell-La Salle Realty Co.*, *supra*, the Court held that the defendant hotel was performing plaintiffs'

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[4] The Second Circuit did not address Cablevision's contention that it would not be a direct infringer because its subscribers would be "doing" the performing by use of their remote controls, the same argument advanced to evade direct liability for copying. The logic of the Second Circuit's analysis would seem to apply, though the court opined that it "does not dictate a parallel conclusion . . . ." Pet. App. 28a.

copyrighted works without authorization because the hotel operated a master radio receiver from which it transmitted live radio broadcasts to speakers in public rooms and to private guest rooms where its guests could choose to listen to the broadcasts. 283 U.S. at 195-96, 197-98.[5]

The Court in *Buck* had no doubt that the hotel was the "actor" which caused the performance and was thus a direct infringer:

> The guests of the hotel hear a reproduction *brought about by the acts of the hotel* in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and

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[5] *Buck* was limited to its facts by a divided Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 n. 18 (1968). The Court in *Fortnightly* held that community antenna television ("CATV") systems, which captured live broadcast signals on towers and transmitted them to homes through cables, were not "performing" the programs, which were authorized for broadcast, but not for retransmission (applying the 1909 Copyright Act).

"Congress had the last word . . . , reversing *Fortnightly*, *Teleprompter*, and *Aiken* on the meaning of 'performance' in the 1976 Act, adopting instead *Buck's* approach." 4 *Patry on Copyright* § 14:6 at 14-21 (2008). Congress also made it clear that cable companies would be liable as direct infringers for unauthorized acts in violation of the exclusive rights in 17 U.S.C. § 106, if outside the scope of the compulsory license in 17 U.S.C. § 111.

> that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose. In each *the music is produced by instrumentalities under its control.*

Buck, *supra*, 283 U.S. at 200 (emphasis added; footnote omitted). This analysis as to who is the "actor" applies here. Cablevision owns, controls and operates the System which makes the copies of petitioners' programs and from which the transmissions of performances to the public are made. Cablevision would clearly be a direct infringer in the operation of its System.

The Second Circuit's analysis is also contrary to the legislative history. Transmission of a public performance includes "the case of sounds or images stored in an information system and capable of being performed or displayed *at the initiative of individual members of the public.*" H.R. Rep. No. 90-83, at 29 (1967) (emphasis added). That is precisely the case here.

The Second Circuit erroneously compartmentalized the process in Cablevision's System, concluding that the transmissions from its hard drives to subscribers are not "to the public," but merely "non-public transmissions" or "purely private transmission[s]." Pet. App. 32a-33a. The Second Circuit previously rejected this analysis in *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (PrimeTime liable for public performance of NFL programming uploaded to satellite in the United States and downloaded to Canadian subscribers).

The court in *PrimeTime* recognized that "the most logical interpretation of the Copyright Act is to hold that a public performance or display *includes each step in the process by which a protected work wends its way to its audience.*" *Id.* (emphasis added; internal quotations and citations omitted).[6] It rejected PrimeTime's contention that the "performance" occurred only during the downlink to Canadian subscribers, *id.* at 12, relying upon *WGN Cont. Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (the Act defines "perform" broadly enough to include intermediate cable carrier's transmission of programming through secondary cable systems and thus indirectly to the ultimate public).

The Second Circuit here took the opposite approach, concluding that there are only individual performances, not performances "to the public." This ignores the intermediate transmissions that occur when Cablevision copies and diverts the original television signal to the buffer copies and then copies the works contained in those signals onto Cablevision's hard disks for later transmission to is subscribers. The Second Circuit's disregard of its precedent in *PrimeTime* also conflicts with the Seventh Circuit's decision in *WGN Cont. Broadcasting Co., supra.*

The Second Circuit's conclusion that only individual, private performances occur in the Cablevision System

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[6] Congress contemplated complex transmission systems: "'The definition of 'transmit' . . . is broad enough to include *all conceivable forms and combinations of wires and wireless communications media*, including but by no means limited to radio and television broadcasting as we know them." H.R. Rep. No. 94-1476, at 64 (1976) (emphasis added).

also conflicts with other circuits. *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 158-59 (3d Cir. 1984) (transmitting movies from video cassettes to booths for viewing by members of public in defendants' store constituted public performances; closing booth door signaled employee to insert cassette and start machine); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (hotel transmitted performances to public with system that enabled guests to select and start playing movies with remote control that activated hotel's video cassette system). These courts analyzed the entire process, including viewing of the same videocassette by later viewers. Contrary to those decisions, the Second Circuit focused only on the final stage in the distribution, not Cablevision's earlier division of one signal into thousands, each of which it transmits to a hard drive destined for a different home. Those transmissions of those identical signals within the System allow thousands of Cablevision subscribers to view the performances at a time of their choosing. Those internal transmissions constitute public performance by Cablevision.

In sum, the scope of liability for direct infringement under the Act is vital to all authors and owners of copyrighted works, most of which can now be digitized, stored, and electronically transmitted. The case is ripe for review because Cablevision's System has not yet been implemented, because of the importance of the issues, and because the Second Circuit's decision is contrary to the Act, its legislative history, and decisions of this Court and other circuits. Determination of the scope of direct infringement at this stage will reduce

the likelihood of widespread infringements through the use of Cablevision's and comparable systems which can never be fully compensated once they become widespread and entrenched.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC. ET AL,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF SCREEN ACTORS GUILD, INC. AND WRITERS GUILD OF AMERICA, WEST, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici (collectively referred to herein as the "Guilds") are labor unions representing artists, including among others, actors and writers in the motion picture, television, commercial and new media industries

Amicus Screen Actors Guild ("SAG") is the nation's largest labor union representing working actors. Established in 1933, SAG represents over 120,000 actors who work in film and digital television, industrials, commercials, video games, music videos and all other new media formats. The Guild exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.

Amicus Writers Guild of America, West, Inc. ("WGAW"), whose predecessor organization was also founded in 1933, is a labor organization and the collective bargaining representative for approximately 11,000 professional writers in the motion picture, television and new media industries. As the bargaining representative of the creators of audiovisual content, the WGAW has a significant

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[1] Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.and have consented to the filing in documents on file with the Court.

interest in the protection of copyrighted material against infringement.

The Guilds have collective bargaining agreements with all of the major motion picture, and television production companies, television networks, and commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of the Guilds' members.

The Second Circuit's decision will have a significant negative impact on the Guilds' members. A service such as the RS-DVR has the potential to reduce the value of creative works by diminishing, or even eliminating, the value of certain exploitation "windows." The Guilds' members rely on residuals – deferred compensation based on the continuing use of the creative works – as an important source of income. As the value of the exploitation windows is diminished or eliminated, so too are the incomes of the Guilds' members. Accordingly, the Guilds and their members have a significant interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

As the petition for *certiorari* demonstrates, this case warrants review by the high court because it presents critical questions about the application of copyright law to new technologies that are rapidly changing the face of the entertainment industry. Petitioners point out that this litigation is part of a line of decisions that includes *Sony*[2] and *Grokster*[3]: cases that had at their core the question of whether copyright holders had a right to protect their creative works from new business models that exploit advances in technology to circumvent copyright. As in those cases, the outcome in the case at bar will affect not just the copyright owners, but the livelihoods of artists who have negotiated, through collective bargaining, compensation based on the copyright owner's revenue for uses of their works.

The entertainment industry relies on a fragile balance of relationships, rights and responsibilities that are fundamental to its successful operation. The economic interests of Guild members depend on that balance as a significant part of their income derives from the copyright owners' ability to monetize their creative works. Cablevision, however, risks upsetting this balance with its RS-DVR service, which is functionally identical to an otherwise

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[2] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[3] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

licensed window of exploitation – video-on-demand ("VOD").

For decades, the Guilds have collectively bargained residual formulas based on the exploitation of creative works over their lifetime. Guild members receive ongoing income as the works are exploited in various consumer markets. An unlicensed service, such as the RS-DVR, which interrupts the flow of revenue to content owners by supplanting an otherwise licensed window, jeopardizes the Guild members' livelihoods. This is of particular concern during difficult economic times.

The Second Circuit's decision, if allowed to stand, will have a potentially destabilizing impact on the entertainment industry. Its effect will be felt not just by the copyright owners or licensees, but by the tens of thousands of individuals whose careers and livelihoods depend at any given time on the copyright owners' ability to generate revenue from their copyrights.

The Guilds therefore urge this Court to grant the petition for a writ of *certiorari*.

ARGUMENT

I. The Entertainment Industry is a Delicate Structure of Relationships, Rights, and Responsibilities and Requires a Certain Degree of Predictability to Function Properly

The entertainment industry is much like a Jenga[4] puzzle, with various relationships, rights and responsibilities forming the building blocks of its structure. These blocks include the copyrights (including all ancillary and related rights) in the creative works, the ability of copyright holders to license their works in various (usually serial) windows of exploitation, and the Guilds' collective bargaining agreements, which provide for compensation to artists based in part on the revenue from that exploitation. When any of these blocks is eliminated or altered, the stability of the structure is threatened. Yet that is exactly what the Second Circuit has done by endorsing Cablevision's Remote Storage Digital Video Recorder ("RS-DVR") service. It has removed a block from the structure by allowing a commercial enterprise to design and operate a service that operates, without license, in an otherwise licensed window.

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[4] As described on Wikipedia: "Jenga is a game of physical and mental skill, marketed by Hasbro, in which players remove blocks from a tower and put them on top." Fifty-four blocks are stacked in a tower eighteen levels high. Players take turns removing a block from within the tower and placing it on top while trying not destabilize the tower and cause it to topple, thus ending the game. Wikipedia: Jenga, http://en.wikipedia.org/wiki/Jenga (last visited October 30, 2008)

The value of a creative work in the entertainment industry is based on revenues earned during discrete windows of exploitation throughout its lifetime. For example, the typical life cycle of a theatrical motion picture would include a window of theatrical release, followed by a release to DVD and pay-per-view, then pay television (including video-on-demand), and finally broadcast and/or cable television.[5] It might also be made available for licensed download on the Internet concurrently with or between other windows. Some windows will overlap and some will be revisited later in the work's lifetime, either through existing licenses or new ones.

Long before a project begins production – often when the project is still just an idea being floated about a production company – the value of the contemplated work is estimated based on projections of potential revenue in each exploitation window. Content creators make decisions about what projects to "greenlight", which writers and directors to hire, which actors to cast, where to shoot, and countless other issues based on settled understandings about the marketplace. Creative talent, particularly actors and writers, depend and rely on the content

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[5] A typical television series will run first on a television or cable network and might re-run multiple times within that same season. A recent practice is for episodes of the series to be available for viewing on the Internet – either ad-supported or through paid downloads - as early as the next day following its first run. A successful series will eventually be syndicated to other broadcast or cable channels. Frequently, television series, whether successful or just well-received, are released to DVD.

creators' ability to maximize revenue from each window for their continuing livelihood.

Any unauthorized use of a copyrighted work upsets the balance within this commercial structure. This is the case when pirated DVDs are sold at swap meets. But it is also the case when an established content distributor adapts new technologies for the express purpose of defeating the rights of copyright owners. And it is particularly destabilizing when the new technology resembles and threatens to supplant an existing licensed window of exploitation.

Cablevision's RS-DVR is just such an unauthorized and destabilizing use.

II. Actors' and Writers' Compensation is Dependent on the Copyright Owners' Licensed Exploitation of their Creative Works and Will Be Negatively Impacted by the Second Circuit's Decision

Actors and writers receive compensation at various stages of a creative work's life-cycle. For decades, the Guilds have collectively bargained with the producers and distributors of creative works to ensure fair compensation for their members – the very talent without which the creative works could not be produced. Pursuant to the Guilds' collective bargaining agreements, actors and writers receive two primary types of compensation - initial compensation when the work is created and residuals for continued exploitation of the work.

Under the Guilds' collective bargaining agreements, as a creative work is licensed to new markets or re-run on television, the actors and writers receive additional compensation in the form of residuals. Some residuals, particularly those for television series, are paid based on a set formula whereby the creative talent receives payment each time an episode is aired.[6] Other forms of residuals, particularly for the cable and pay television markets, are based on a percentage of the revenue earned by the work's copyright owner or distributor for licensing the work to that market.[7] As a result, any

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[6] For example, Section 18 of the 2005 SAG Television Agreement provides that when a program is rerun on a network in prime time each principal performer shall receive "one hundred percent (100%) of his 'total actual compensation' for each such rerun," while reruns in syndication and on a network other than during prime time are paid on a descending scale based on the performer's "total applicable minimum salary" (i.e. the minimum salary set forth in the Television Agreement).

Similarly, Article 15 of the 2004 WGA Theatrical and Television Basic Agreement provides that when a program is rerun on a network in prime time each credited writer's compensation shall be "not less than one hundred percent (100%) of the writer's applicable minimum compensation", while reruns in syndication and on a network other than during prime time are paid on a descending scale.

[7] For example, Section 18.1 of the 2005 SAG Television Agreement provides that "upon release... to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Producer shall pay to [SAG], for rateable distribution to the performers, [a] percentage of distributor's gross receipts", as that term is defined in the agreement, presently equal to six percent (6%). Section 20 provides a similar formula for television product released to pay-television. The Producer-SAG Codified Basic Agreement of 2005 provides similar formulas for release of

reduction in that revenue received by the copyright owner or distributor directly affects the residuals received by creative talent.

The Guilds and copyright owners, including most of the Petitioners, have collectively bargained residuals formulas for nearly six decades. These formulas have frequently been the subject of heated negotiations and, on more than one occasion, strikes. In fact, residuals were at the forefront of the recent WGA strike, and in the still-ongoing SAG negotiations with the content owners.[8] Residuals formulas for VOD and other forms of emerging technology have been the subject of considerable effort in the Guilds' most recent round of

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theatrical product to the free television (including basic cable) and pay television windows.

Similarly, Article 58 of the 2004 WGA Theatrical and Television Basic Agreement provides that "[u]pon release... to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Company shall pay, in the aggregate, to the credited writer or writers... [a] percentage of the Company's accountable receipts", as that term is defined in the agreement, presently equal to two percent (2%) or one and two-tenths percent (1.2%) for theatrical product released to basic cable. Article 51 provides similar formulas for release of television and theatrical product to the pay television window and Article 15 provides the formula for theatrical product released to the free television window.

[8] The WGA's negotiations with the content owners concluded with members ratifying its agreement on February 25 after a 100-day strike. SAG's negotiations with the content owners remain unconcluded, with certain residuals, particularly residuals for content distributed in new media, being one of the key points of on-going disagreement between the parties.

negotiations for their television and theatrical contracts.

As technology has evolved, so have the residuals provisions in the Guilds' collective bargaining agreements. The concept of residuals was first discussed in the 1940s due to changes in television production and the growing ability to record programming for later re-broadcast. Residuals for re-runs of television programs were first recognized in the Guilds' collective bargaining agreements in the early 1950s and then in 1960 for motion pictures that were broadcast on television. By the early 1970s, the Guilds and content owners had collectively bargained provisions for the "Supplemental Markets" – pay television (which includes VOD) and videocassette (which is understood to include DVD).[9] In the 1980s, residuals were negotiated for exploitation of content released to and created for basic cable. In 2001, WGA and SAG negotiated sideletters to their respective agreements, under which content owners acknowledged the obligation to pay residuals for certain content distributed over the Internet.

Residuals are a crucial source of income that can often be the lifeblood of the working actor and writer, particularly in difficult economic times.[10] Because residuals are paid throughout the lifetime of a project as that project is released in different

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[9] The formula for calculating those residuals was altered in 1980 in response to changes in the industry.

[10] In 2007, for example, residuals accounted for roughly 36% of earnings by principal actors under SAG's Television and Theatrical contracts.

exploitation windows, they can provide a flow of income to creative employees whose work is intermittent by its very nature. This important earnings stream is completely dependent on the content owners' ability to maximize revenues received for licensing rights to other links in the distribution chain. When that chain is interrupted by an unlicensed service that usurps an otherwise licensed market, so too is the actor's and writer's livelihood.

III. By Delivering Programs to Customers for a Subscription Fee When They Want It, Cablevision's RS-DVR Service Replaces Licensed Video-On-Demand Services for Which Actors and Writers Would Otherwise Receive Compensation

The RS-DVR service is a commercial service for which Cablevision receives a subscription fee from its users. Although it resembles a traditional set-top storage digital video recorder ("STS-DVR"), it is quite different. In fact, is "more akin to VOD than to a VCR, STS-DVR, or other time-shifting device." *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 619 (S.D.N.Y. 2007). Unlike an STS-DVR or other time-shifting device, Cablevision's RS-DVR is a subscription-based service that requires an on-going relationship with Cablevision.

As the district court points out "the RS-DVR bears a striking resemblance to VOD – a service that Cablevision provides pursuant to licenses negotiated with programming owners." *Id.*. Likewise, the

Second Circuit acknowledged that, in its operation, "the RS-DVR more closely resembles a VOD service, whereby a cable subscriber uses his remote and cable box to request transmission of the content, such as a movie, stored on computers at the cable company's facility." *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008) *citing* 478 F. Supp. 2d at 612.

Pursuant to the Guilds' agreements with the content owners, actors and writers are entitled to residuals based on the license fees paid by cable companies for the right to exploit creative content in the video-on-demand window. The Guilds have spent considerable time and effort negotiating compensation terms for this window. By usurping this exploitation window without negotiating and paying appropriate license fees, Cablevision has unjustly enriched itself – not just at the expense of the copyright owners, but also at the expense of the actors and writers who created the content.

IV. Widespread Implementation of a Subscription Service like the RS-DVR Could Potentially Affect the Commercial Production Industry

The advent and proliferation of time-shifting technology – from the first VCRs to the DVR – has changed the way consumers receive commercial advertisements. As technology has changed, the advertisers also have had to change and adapt how they convey their messages. The RS-DVR service is an advance that can lead to even more drastic changes in advertising practices. It goes beyond

private time-shifting by consumers in the home because, like VOD, it is a commercial service through which Cablevision (not the home viewer) provides the programming when its subscribers want it, and in the process supplants an otherwise licensed window of exploitation.

Just as the content creators rely on license fees to fund production of their content, the broadcast and cable industry rely on revenue from selling advertising time to license the content. As time-shifting technology proliferates, the broadcasters and cable networks will need to find ways to make up for lost commercial revenue. One common practice is the practice of "product placement" whereby a commercial product (such as, for instance, a can of Coca-Cola) is placed in one or more scenes of a television show. While this practice has existed for decades in the United States in both television and movies it has evolved into a new and exponentially growing form of "product integration".

"Product integration" is the practice of inserting or intertwining a product into the story line of television program for payment or other consideration. The previously harmless can of Coke now plays an integral role in the plot of a particular episode which generally extols the virtues of Coca-Cola. This practice has arisen from advertisers' concerns about consumers' ability to bypass traditional commercial interruptions with new consumer technologies such as DVRs, as well as Internet distribution of content. As the USA Today recently noted, "[r]ather than exist as mere props, products are being woven more tightly into story

lines as crucial plot points of subjects of dialogue, making ad messages impossible to skip." Gary Levin, *The newest characters on TV shows: Product plugs*, USA Today, September 20, 2006 at 1A.

The creative community has become increasingly concerned with the rising use of stealth advertising in the form of product placement and product integration on broadcast television. Writers typically have little control over the commercial messages they are required to weave into the story line and actors are routinely asked at the last minute to perform lines endorsing a product. This practice of "forced endorsement" can ultimately foreclose other, legitimate endorsement opportunities for actors and thereby reduce their earning capabilities.

The RS-DVR service, which requires no additional equipment for the user, can lead to the further proliferation of on-demand time-shifting technology to a much broader audience in a very short time. One analyst estimates that with services such as the RS-DVR, "DVR penetration could now jump to north of 60 percent of cable households (that is, all digital cable subscribers)." Brian Stetler, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. Times, Aug. 5, 2008 at C8. Such proliferation will only hasten the advertisers' need to find new forms of revenue through practices such as product integration.

But even more significantly, because the RS-DVR stores its data on centrally located servers under its control, Cablevision potentially has the capability to "refresh" the advertising that is associated with each

show. *Id.* Aside from the impact on the commercial industry, this ability to alter content begs the question of what other changes a company like Cablevision could make to existing content saved on its servers. It seems highly within the realm of possibility that a company utilizing a technology and service such as the RS-DVR could replace content, whether commercial advertisements or otherwise, it deems objectionable, thus stunting the free flow of ideas and messages to the consuming public without its knowledge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL.,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* SONY BMG MUSIC ENTERTAINMENT, WARNER MUSIC GROUP CORP., UMG RECORDINGS, INC., ASSOCIATION OF AMERICAN PUBLISHERS, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INTERNATIONAL PUBLISHERS ASSOCIATION AND INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Sony BMG Music Entertainment, Warner Music Group Corp., UMG Recordings, Inc., Association of American Publishers, Association of American University Presses, International Publishers Association, and International Confederation of Societies of Authors and Composers (CISAC) are individual companies, trade associations and others who own and create (or who represent owners and creators of) some of the most valuable and well-known copyrighted works, including popular music and books. Recognizing the realities and potential of the digital age, *amici* have supported and promoted a host of new technologies in order to foster lawful ways of distributing their works via the Internet and comparable methods. *Amici*'s efforts have provided consumers with a wide variety of new means of accessing and enjoying *Amici*'s copyrighted content. Unfortunately, such efforts are threatened by those – like Cablevision – who seek to abuse technology to profit from copyrighted content without compensating the creators and owners. Indeed, as new means of authorized delivery of digital content have emerged,

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[1] Pursuant to Rule 37, the parties were provided with timely notice of the intent to file this brief and they have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

so too have unprecedented levels of digital piracy. Services that misuse new technology to attempt end-runs around settled copyright protections without compensating the creators and owners jeopardize copyright's incentive structure in the digital age. Cablevision's RS-DVR service is just one example.

Amici wish to demonstrate the potentially devastating impact of two of the Second Circuit's clearly erroneous rulings by illustrating how, as a practical matter, those rulings may jeopardize increasingly prevalent lawful means of distributing *Amici*'s copyrighted digital content. As *Amici* will show, these negative consequences are global in scope. *Amici* also seek to elaborate upon legal arguments demonstrating the need for this Court's review that are particularly relevant to protecting the types of works copyrighted by *Amici*, such as sound recordings and books.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit's decision cannot stand because it undermines basic copyright protections in the digital age. First, the unprecedented ruling below threatens to strip established rights of *Amici* by creating an unfounded "automation" exception to copyright protection. According to the Second Circuit, Cablevision is immunized from direct liability for copying and storing copyrighted content simply because it has automated its service and thus lacks the "volition" supposedly required for liability. This ruling is plainly wrong under established

precedent concerning direct liability for infringement of copyrighted material even where (as here) the customer "requests" that the infringement be performed. *Amici*'s works already are widely distributed by "automated" services, and, as technology continues to improve, such "automated" services will only continue to proliferate. Thus, the Second Circuit's novel gloss on "volition" seriously threatens the protection of *Amici*'s creative works.

Similarly harmful and contrary to settled law is the Second Circuit's unduly limited conception of a "public" performance. By holding that individual, on-demand transmissions are not "public" performances entitled to protection under the Copyright Act ("Act"), the Second Circuit's ruling threatens established performance rights in digital transmissions. That ruling also directly conflicts with the Act's settled licensing scheme for digital sound recordings, which repeatedly recognizes that individual transmissions, including on-demand transmissions, are "public" performances, notwithstanding that each such transmission is sent to a unique customer. The Second Circuit's ruling creates perverse incentives for services like Cablevision to massively copy copyrighted content in order to claim that delivery of individual transmissions of that content is not a "public" act. Because *Amici*'s copyrighted content is increasingly available through licensed "on-demand" Internet services, the Second Circuit's ruling threatens to upend these services and incentivize widespread

piracy of *Amici*'s works without any meaningful recourse for copyright owners like *Amici*.

These erroneous rulings threaten severe consequences both domestically and abroad. Content holders like *Amici* routinely authorize businesses to employ new and emerging technologies to distribute *Amici*'s works for a fee via "automated" processes. However, unlike other content-based services such as iTunes and Rhapsody (online music services), Kindle and Reader (online e-book services), GameTap (an online gaming service) and Movielink (an online movie provider), Cablevision has chosen to amass, copy and transmit copyrighted digital content without authorization. The Second Circuit has placed Cablevision at an inappropriate competitive advantage to such lawful services. Moreover, under the Second Circuit's decision, services that allow their users to select digital content for download may attempt to argue that no authorization is needed simply because the subscriber selects the works to download and receives the download through an automated, "on demand" process. By allowing Cablevision to appropriate copyrighted content without compensating creators, the Second Circuit's decision creates an unprecedented exception to the Copyright Act that undermines the economic incentive system upon which copyright law is based.

The Second Circuit's decision also will have undesirable global consequences. It directly conflicts with the international treaty obligations of the United States to protect the rights of copyright

holders. Moreover, it will jeopardize international agreements regarding the use of digital content and will encourage other countries to erode copyright protections like the Second Circuit has.

ARGUMENT

I. The "Volitional Act" Requirement Created By The Second Circuit Threatens *Amici*'s Established Rights By Absolving Clearly Infringing Copying Activity Based On An Unwarranted "Automation Exception."

1. It is undisputed that Cablevision chooses the copyrighted works made available to its customers; that Cablevision's servers make huge numbers of copies of copyrighted works; and that Cablevision stores these copies on its server for subsequent transmission to its customers. Pet. App. 4a-6a. Yet, the Second Circuit exempted Cablevision from direct liability for this profligate copying of copyrighted works due to its erroneous conclusion that "volitional conduct is an important element of direct liability" and that Cablevision categorically lacks the necessary volition because the copies "are made automatically upon [a] customer's command." Pet. App. 21a, 22a. Both conclusions are wrong.

As Petitioners have convincingly shown, the Second Circuit's "volitional act" precondition to liability for copying has no basis in statute and conflicts with this Court's precedent. See Pet. at 24-29. Indeed, as even the primary case relied on by the Second Circuit recognizes, "copyright is a strict

liability statute." *Religious Tech. Ctr. v. Netcom Online Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). Because Cablevision copies copyrighted works without authorization, it is liable as a direct infringer. 17 U.S.C. §§ 106(1), 501(a).

Not only does the Act clearly provide for liability for flagrant copying like Cablevision's, but the Second Circuit's ruling deviates from settled precedent providing that an infringing service is not shielded from direct liability by responding automatically to consumer requests. *See* Pet. at 24-29. In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), this Court held defendants directly liable for their copying and distribution of a vast array of copyrighted electronic content delivered to users automatically upon request, reasoning that the defendants – like Cablevision here – "are not merely selling 'equipment'; they are selling copies of the Articles." *Id.* at 504. Similarly liable for direct infringement have been a variety of "automated" services that violate copyright "automatically" at a user's command. *See, e.g., Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (automated telephone service for listening to remote radio broadcasts); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991) (on-demand transmission of movies to hotel guests); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (table decision) (automated Internet service delivering copyrighted images to users).

The Second Circuit's decision is also in sharp conflict with the established rule that "copyshops" are directly liable for making infringing university "coursepacks" where the shops exercise "control" over the copying process – just as Cablevision does here. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526, 1546 (S.D.N.Y. 1991); *see Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1383 (6th Cir. 1996). In these cases, it was no defense to the copyshops' liability for direct infringement that they acted at the direction of professors and students in making copies of copyrighted works without paying royalties. Rather, it was plain, as here, that despite acting at others' request, the copyshops controlled the copying process and could have – but simply chose not to – obtain the required licenses that would have cut into their profits.

The Second Circuit found these critical cases inapposite, claiming that "Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises." Pet. App. 22a. The Second Circuit's analogy is wrong. In fact, Cablevision presents an even stronger case for direct infringement than the established copyshop cases, because it is Cablevision that is bringing the content to the customer, not the other way around. If anything, Cablevision resembles a store proprietor *who stocks his shelves with copyrighted works* and charges a subscription fee to customers for copying and transmitting those works. Such a proprietor is plainly liable under the "copyshop" cases, which are

irreconcilable with the Second Circuit's ruling at issue here.[2] Moreover, given (1) the size of the proprietor (Cablevision), (2) its ability to disseminate works on an enormous scale, (3) that others may seek to emulate Cablevision's example if the Second Circuit's ruling stands, and (4) the digital (and therefore exponentially replicable) nature of the copyrighted content that Cablevision is transmitting, Cablevision presents a far greater threat to the value of *Amici*'s copyrights than the entities found liable in the above-cited cases.

Faced with this considerable contrary precedent, the Second Circuit sought refuge in the *Netcom* decision, in which the Northern District of California exempted an Internet service provider ("ISP") from direct liability "for incidental copies automatically made on [its] computers using their software as part of a process initiated by a third party." 907 F. Supp. at 1369. According to the Second Circuit, "*Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made," as "volitional conduct is an important element of direct liability." Pet. App. 20a, 22a. But the Copyright Act does not contain or support any such "volitional" requirement for direct liability. As even *Netcom*

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[2] The copyshop cases also confirm that whether the customers have a "fair use" defense to direct infringement is completely irrelevant to the imposition of direct liability for copying where, as here, the copying is "performed on a profit-making basis by a commercial enterprise." *Princeton Univ. Press*, 99 F.3d at 1389.

recognized, "copyright is a strict liability statute." 907 F. Supp. at 1370.

In any event, the Second Circuit simply ignored the crux of *Netcom*: there, the ISP lacked "volition" because "Netcom does not create or control the content of the information available to its subscribers." *Id.* at 1368. *Netcom* expressly conditioned exemption from direct liability on the fact that the "copies are uploaded by an infringing user" – not Netcom – and that "Netcom does not maintain an archive of files for its users." *Id.* at 1371, 1372. *Netcom* also repeatedly emphasized that its ruling was based on the unique context of ISPs providing passive conduit service to the millions of users constantly exchanging data on the Internet. *See id.* at 1372 (Netcom "merely provides access to the Internet"). *Netcom* simply has no application other than in the unique context of an ISP acting as a passive conduit, in which "billions of bits of data flow through the Internet and are necessarily stored on services throughout the network." *Id.*

Cablevision is not an ISP. Moreover, in stark contrast to the ISP in *Netcom*, which, "d[id] not create or control the content of the information available to its subscribers" but "merely provide[d] access to the Internet," 907 F. Supp. at 1372, Cablevision "aggregate[s] television programming" and thus has "control over the content available for recording," Pet. App. 4a, 6a. *Netcom* plainly does not excuse Cablevision's provision and marketing of a

vast library of copyrighted works for copying and playback, and the entire means to do so.[3]

Finally, the Second Circuit's ruling is based on the fundamentally flawed premise that there can be only one "copier" (or "volitional copier"), incorrectly asking "who actually 'makes' a copy" and whether Cablevision "displace[s] the customer as the person who 'makes' the copies." Pet. App. 22a, 23a. But here, as with many digital providers that make content available to users, there are at least two "copiers" – the customer and Cablevision. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) ("a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm"). Given that Cablevision designed, constructed and operates the entire copying apparatus, Pet. App. at 20a, and that

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[3] Even in the limited context of an ISP, *Netcom* set forth a minimal conception of "volition" and did not require, as the Second Circuit now appears to, active human intervention in each act of copying. *Compare* Pet. App. 22a ("a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make a copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct"), *with Netcom*, 907 F. Supp. at 1370 (describing "some element of volition or causation [that] is lacking where a defendant's system is merely used to create a copy by a third party").

it charges subscribers for the copies, it is nonsensical to claim that Cablevision is not a copier.[4]

2. The Second Circuit's "volitional act" requirement is wrong, and it threatens a harmful effect upon *Amici*'s copyrighted works. *Amici* have worked hard to foster lawful services that are authorized to provide consumers with a variety of new means of accessing copyrighted digital media. For example, there has been an explosion of lawful Internet sites for purchasing digital sound recordings (such as Apple's iTunes) and "streaming" such content (such as RealNetworks' Rhapsody). *See* http://www.riaa.com/toolsforparents.php?content_selector=legal_music_sites (listing legal online music sources). Digital "e-books" are increasingly available online for download and reading on viewers such as the Sony Reader and Amazon Kindle. As shown by these representative examples, in the digital age, content holders such as *Amici* routinely authorize businesses to employ emerging technologies to distribute content for a fee via automated processes.

Many of these services are, in all meaningful respects, "automated" – at least with respect to the Second Circuit's understanding of that term. And they will only continue to become more so as technology improves. Yet, to date, and for good reason, the copying, distributing and transmitting of

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[4] As Petitioners have shown, secondary liability is irrelevant to Cablevision's liability for direct infringement and, in any event, is no substitute. *See* Pet. at 20-21.

Amici's works through these services have been accorded full copyright protection – regardless whether these services "automatically produce[] copies on command," and despite the "customer's conduct in ordering that system to produce a copy of a specific program." Pet. App. 20a, 22a.

The Second Circuit's erroneous "volitional act" ruling therefore poses a serious threat to *Amici*'s protected content. If that ruling stands, an Internet service that currently obtains authorization to use copyrighted digital content might try to claim that it needs no authorization because a subscriber (rather than the service itself) selects the works to download and receives the downloads through an automated process. *Cf.* Pet. App. 20a, 22a. Similarly, an interactive music streaming service might try to argue that it need not obtain authorization because, once again, subscribers choose the music, which is then delivered by a system "which automatically obeys commands and engages in no volitional conduct." Pet. App. 22a. The same would be true for services that provide e-books and other copyrighted content for online distribution or access.[5]

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[5] Although the Second Circuit's erroneous "public" performance ruling, *see infra* Section II, purported not to resolve whether Cablevision "does" the performing (in contrast to the copying) in light of the "automatic" nature of Cablevision's system, Pet. App. 28a, the Second Circuit's flawed rationale for exempting "automatic" copying also threatens to exempt the "automatic" infringement of *Amici*'s other protected rights in their

The Second Circuit's ruling also provides wrongheaded encouragement to illegitimate services that seek to exploit digital content without compensating copyright owners, including *Amici*. The Second Circuit's ruling incentivizes these would-be mass infringers to automate copying in order to avoid liability for direct infringement, even though such services know full well that copyrighted works will be massively copied by and stored on their servers – as the services are making the copyrighted works available to customers in the first place. In fact, just last week, authors and book publishers reached a settlement with Google regarding Google's ongoing attempt to provide digital copies of millions of copyrighted books to its billions of users without seeking permissions or compensating copyright holders. *See* Association of American Publishers Press Release (Oct. 28, 2008), *available at* http://www.publishers.org/main/Copyright/Google/Release.htm. If the Second Circuit's "automation" exemption to copyright infringement stands, copyright owners like these will be hampered in protecting their digitized works from rampant copying, distribution and transmission.

The Second Circuit's ruling also jeopardizes the continued existence of legitimate services, such as iTunes and Rhapsody, which have worked with

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works – such as distribution, performance and display. *See* 17 U.S.C. § 106. The Second Circuit's ruling should therefore be put to rest before it is used to erode copyright protection in digital works entirely.

Amici and other copyright owners to provide lawful, authorized access to protected works. It is these lawful services that embody the economic incentive system at the heart of copyright law – not services like Cablevision's RS-DVR, which seeks to profit from creators without compensating them fully. Indeed, the rapid and widespread emergence of services like iTunes and Rhapsody makes clear that, far from chilling emerging technology, protecting copyright in the digital age by requiring authorization and punishing direct infringement simply ensures that creators are properly compensated as incredible innovation continues to unfold. Conversely, the Second Circuit's decision encourages the development of inefficient technology specifically designed to avoid compensating creators.

II. The Second Circuit's Definition Of "Public" Performance Is Contrary To The Act And Threatens A Damaging Effect On *Amici* And Settled Practices For Licensing Their Protected Digital Works.

1. The Second Circuit also radically and erroneously narrowed copyright holders' "public" performance right. According to the Second Circuit, because "each RS-DVR transmission is made to a given subscriber using a copy made by the subscriber, . . . such a transmission is not 'to the public,'" Pet. App. 39a, as required for protection under the Act, *see* 17 U.S.C. §§ 101, 106(4), (6).

As Petitioners have clearly shown, the Second Circuit's ruling cannot be squared with the

Copyright Act or settled law. *See* Pet. at 33-39. Separate "on-demand" transmissions of a performance to different customers at different times constitute a "public" performance that is protected under Section 101 of the Act. *See id.* Indeed, the Act's definition of a "public" performance plainly covers individual, on-demand digital transmissions, such as those at issue here. *See* 17 U.S.C. § 101 ("public" performance includes "transmit[ting] or otherwise communicat[ing] a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in the separate places and at the same time or at different times").

Although Section 101 is dispositive, *Amici* include owners of protected sound recordings and thus emphasize that the Second Circuit's interpretation of "public" also is plainly contrary to Section 114 of the Act, which covers the "scope of exclusive rights in sound recordings." 17 U.S.C. § 114. Section 114 repeatedly refers to the "public" performance right at issue in the Second Circuit's ruling, specifically addressing this right in the context of "interactive" or "on-demand" services for digital sound recordings, *e.g.*, *id.* § 114(d)(3). As Petitioners briefly note, Section 114, like other provisions of the Act, "treats on-demand transmissions to individual members of the public as public performances," Pet. at 34 n.7, and thus demonstrates that the Second Circuit's ruling to the contrary is incorrect.

To put this point in context, in 1971, Congress first recognized a copyright in sound recordings; compositions, by contrast, enjoyed prior protection. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102). At that time, Congress did not provide for a performance right for sound recordings. *See id.*

With the rapid rise of both improving digital technology and increasingly prevalent means of widely transmitting digital content (such as satellite, cable, and the Internet), in 1995 Congress enacted a performance right for digitally transmitted sound recordings. *See* Digital Performance Right in Sound Recordings Act of 1995 ("1995 Act"), Pub. L. No 104-39, 109 Stat. 336 (1995) (codified as various amendments to 17 U.S.C.). This new legislation recognized, "in the case of sound recordings," a right "to perform the copyrighted work *publicly* by means of a digital audio transmission" (emphasis added)); 17 U.S.C. § 106(6). Thus, as of 1995, digital sound recordings received "public" performance protection, just like other copyrighted works. *See id.* § 106(4).

As the legislative history of the 1995 Act makes clear, the purpose of the Act was to protect "sound recordings which are *publicly performed* by means of a digital transmission." S. Rep. No. 104-128, at 10 (1995) (emphasis added), *as reprinted in,* 1995 U.S.C.C.A.N. 356. That same legislative history shows that Congress clearly understood – consistent with Section 101 of the Act and contrary to the Second Circuit's ruling – that "public" performances

include "on-demand" digital transmissions, despite that members of the public receive separate "on-demand" transmissions:

> Trends within the music industry, as well as the telecommunications and information services industries, suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future. Some digital transmission services, such as so-called "celestial jukebox," "pay-per-listen" or "audio-on-demand" services, will be interactive services that enable a member of the public to receive, on request, a digital transmission of the particular recording that person wants to hear.
>
> * * *
>
> The Committee believes that copyright owners of sound recordings should enjoy protection with respect to digital subscription, interactive and certain other such performances.

Id. at 14, 15; *see also* H.R. Rep. No. 104-274 (1995).

The Section 114 statutory licensing provisions enacted by Congress in 1995 regarding on-demand sound recordings confirm what this legislative history makes obvious: "public" performances include on-demand transmissions such as those stripped of protection by the Second Circuit.

First, the 1995 Act defines an "interactive service" as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7). Thus, Congress plainly understood that on-demand transmissions selected by individual customers – like Cablevision's transmissions here – are "public" performances protected by the Act. *Id.*

Second, the licensing provisions regarding "interactive" services for sound recordings clearly contemplate that such transmissions are, in fact, "public" performances. *See, e.g.*, 17 U.S.C. § 114(d)(2)(addressing "[t]hc performance of a sound recording publicly by means of a subscription digital audio transmission"); *id.* § 114(d)(3)(C) (conditioning when "an interactive service may . . . publicly perform a sound recording"); *id.* §§ 114(d)(3)(A)-(B).

Additional 1998 amendments to Section 114 further confirm this point. As part of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as various amendments to 17 U.S.C.), Congress extended "public" performance rights to "webcasts" of digital sound recordings – *i.e.*, non-interactive transmissions of sound recordings to individual users. *See* 17 U.S.C. § 114(j)(6). Again, as with the individualized "interactive" transmissions covered by Congress in 1995, the 1998 amendments were premised on the fact that each webcast

transmission to an individual user – like each of Cablevision's individual transmissions – is a covered transmission "provide[d] to the public." *Id.*

Section 112 of the Act, which pertains to "ephemeral recordings," further demonstrates the error of the Second Circuit's "public" performance ruling. Ephemeral recordings are copies of sound recordings that are "created for the purpose of facilitating a transmission of a public performance of a sound recording." 17 C.F.R. § 262.2(f). Section 112 is premised on the fact that such copies are made by the service, not the end-user, and subjects such copying to clear limitations. *See, e.g.*, 17 U.S.C. §§ 112(a), (e). Like Section 114, the premise of Section 112 is that the individual transmissions to the public enabled by the ephemeral recordings are "public" performances protected by the Act. *See id.*[6]

Accordingly, the Second Circuit's holding that "RS-DVR playback transmission[s] . . . made to a single subscriber using a single unique copy produced by that subscriber . . . are not performances 'to the public,'" Pet. App. 41a, is contrary to the Act and clear error. Indeed, were the Second Circuit's interpretation of the term "public" correct, then Section 114's entire licensing scheme

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[6] The Second Circuit's holding that Cablevision is not the "copier" of the copies that it uses for its transmissions, *see supra* Section I, is also contrary to the established understanding in the sound recording context that ephemeral recordings are made by the service, not the end-user.

for digital sound recording transmissions would be meaningless because, according to the Second Circuit, transmissions to individual members of the public are, by definition, not "public" performances entitled to copyright protection. Nothing in Section 114 remotely suggests an exception to its licensing requirements for services transmitting performances to individual subscribers from separate copies of a recording associated with each subscriber. To the contrary, as the Act repeatedly makes plain – and contrary to the Second Circuit's strained reasoning – "public" performances include individual transmissions to individual consumers.[7]

2. As Congress correctly foresaw in 1995, digital content – including sound recordings and other protected works of *Amici* – increasingly reaches

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[7] Although the Second Circuit claimed that its "public" performance ruling did not depend on whether Cablevision or the customer "does the transmitting," Pet. App. 28a, the Second Circuit's flawed interpretation of "public" performance appears to have stemmed in part from its erroneous ruling that the customers, not Cablevision, make the copies stored on Cablevision's server and used for the individual transmissions. *See, e.g.*, Pet. App. 36a (holding that the transmissions are not "public" because "each RS-DVR transmission is made to a given subscriber *using a copy made by that subscriber*" (emphasis added)). That the Second Circuit's unprecedented interpretation of "public" performance relies on its clearly erroneous "volitional act" ruling, *see supra* Section I, weighs strongly in favor of this Court's review of both of these important questions.

consumers via individualized, on-demand transmissions. As this mode of transmission has proliferated, *Amici* have painstakingly worked with lawful transmitters of digital content to make *Amici*'s copyrighted content available to the public on an "on-demand" basis. These efforts have included widespread authorization of *Amici*'s digital content so that *Amici*'s works are available to the public while creators are compensated for the public performance of their works. *See supra* p.11.

The Second Circuit's "public" performance ruling threatens to damage copyright protection of the works of *Amici* and other creators in this "on-demand" digital age. To begin with, the Second Circuit's ruling cannot stand because it will upend the settled licensing system for digital sound recordings set forth in Section 114 of the Act and described above. The Second Circuit's holding that individual on-demand transmissions are not "public" performances simply cannot be reconciled with Section 114, which is based on exactly the opposite premise: that individual on-demand transmissions *are* "public" performances which must be licensed to be used lawfully. This ruling will undermine those on-demand services lawfully licensing *Amici*'s recordings while encouraging services that engage in rampant unlicensed copying and transmission to attempt to adapt their technology to fit within the Second Circuit's holding. Given the potentially sweeping consequences of the Second Circuit's ruling for these settled licensing practices, this Court's review is urgently needed.

The consequences of the Second Circuit's "public" performance ruling are not, however, limited to the licensing system for sound recordings. Were the Second Circuit's ruling to stand, it threatens to render the public performance right effectively meaningless in the digital context. As Congress aptly observed in 1995, and as developments since have confirmed, technology is rapidly moving toward enabling consumers to receive a wide variety of copyrighted content on an on-demand basis – including books, movies, television shows, sound recordings and video games. Indeed, Cablevision's own technology demonstrates the ease with which services like Cablevision can create literally millions of individual "transmissions" of the same copyrighted content (based on massive copying of that copyrighted content), in order to provide each member of the public with his or her "own" transmission. Yet, under the Second Circuit's ruling, each of these individual transmissions is not a "public" performance – and thus unprotected.

It is both contrary to the Act and perversely unacceptable that, under the Second Circuit's ruling, the copying and on-demand transmission of the same digital content to millions of people is sanctioned as "non-public," Pet. App. 32a, but that the transmission of a VCR tape from the front desk of a video rental store to individuals or small groups in "private booths" at the same store is a protected "public performance under . . . the statutory definition," Pet. App. at 37a-38a (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d

154, 156-57 (3d Cir. 1984)). Congress simply could not have intended such an absurd result. And it did not. As clearly established by the Act's language and all decisions prior to the Second Circuit's, "on-demand" transmissions to individual members of the public are protected "public" performances.[8]

Not only does the Second Circuit's decision senselessly strip settled copyright protections, but it perversely incentivizes copying of protected works by entities like Cablevision for the sole purpose of creating individualized transmissions to subvert the "public" performance right. Services should not be

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[8] The Second Circuit inexplicably claimed that *Redd Horne* "supports our decision." Pet. App. 37a. In contrast, the Second Circuit rejected as "untenable" the on-point precedent of *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991). Pet. App. 40a. *On Command* found infringement of the "public" performance right by a hotel that operated an "innovative video viewing system" that permitted hotel occupants to use their in-room television remote control to select movies, which were then automatically transmitted to occupants' rooms from a bank of VCRs in a central area of the hotel. 777 F. Supp. at 788, 789-90. *On Command* correctly determined – in stark conflict with the Second Circuit – that "[t]he fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial," and that "whether the number of hotel guests viewing an On Command transmission is one or one hundred, . . . the transmission is still a public performance since it goes to members of the public." *Id.* at 790.

encouraged to evade the "public" nature of performances simply by creating millions or billions of unique copies. To the contrary, they should license the protected content as Congress clearly intended they do.

III. The International Implications Of The Second Circuit's Ruling For The United States And International Rightholders Further Necessitate This Court's Review.

Although the severe domestic consequences of the Second Circuit's ruling alone warrant this Court's review, the ruling's damaging international implications also necessitate review. The Second Circuit's failure to protect established rights of copyright holders would directly conflict with multiple international agreements to which the United States is a party. Moreover, the Second Circuit's ruling will serve as an open invitation to compromise copyright protection worldwide.

Under the terms of several international agreements, the United States is required to provide copyright owners the exclusive rights to authorize or prohibit the reproduction of their works in any manner or form.[9] In addition, the WCT and the

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[9] These agreements include: the Berne Convention, the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), April 15, 1994, 33 I.L.M. 81 (1994); the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT"), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36

WPPT, two World Intellectual Property Organization treaties from the mid-1990s known as the "internet treaties," *see supra* n.9 – updated international copyright standards to ensure the adequate protection of works in the digital era. Among other things, these treaties include a "making available" right to cover "on demand" technology in which consumers "pull" digital works at a time and place of their choice.[10]

By immunizing Cablevision from "public" performance liability for its on-demand transmissions, the Second Circuit's ruling fails to protect the "digital, interactive transmissions" of copyrighted material that the WCT and WPPT clearly cover and that the United States is therefore obligated to protect. *See* MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET 503 (Oxford 2002).

I.L.M. 65 (1997); the WIPO Performances and Phonograms Treaty ("WPPT"), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997); and various bilateral free-trade agreements ("FTAs") with, for example, Jordan, Chile, Singapore, Australia, Morocco, Bahrain

[10] *See, e.g.*, WCT Art. 8 (requiring signatories to provide authors "the exclusive right of authorizing . . . the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"); *see also* WPPT article 14; FTAs cited in *supra* n.9.

Further, by immunizing Cablevision's mass copying and distribution of copyrighted works because of the supposedly "automated" nature of its service, the Second Circuit's ruling also places the United States in potential breach of its obligations under international agreements to protect copyright owners from unauthorized reproduction of their works.[11] Just as there is no exception to direct liability for "automated" infringement services under domestic law, *see supra* Section I, these agreements permit no such exception.

More broadly, the Second Circuit's decision is likely to have dangerous consequences abroad and serve as a hindrance to international commerce, as other countries regularly look to the United States for guidance regarding copyright protections in the digital age. Courts worldwide – including in Japan, Korea, Taiwan and Australia – have cited and relied on critical decisions of this Court and the Courts of Appeals regarding digital copyright, such as *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The Second Circuit's ruling also may encourage the United States' trading partners to interpret their treaty

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[11] All international copyright agreements require such protection, *see, e.g.*, Berne Convention Art. 9(1), and the internet treaties specifically provide that this right extends to "storage of a protected work in digital form in an electronic medium," WCT Agreed Statement to Art. 1(4); WPPT Art. 7.

obligations too narrowly, leading to a rising global tide of unauthorized and uncompensated use of creative works. Digital distribution of music and other works is increasingly global, but for multi-territory deals and lawful international commerce to thrive, all jurisdictions – including the United States – must meaningfully and consistently apply internationally agreed copyright protections. The Second Circuit's decision, which directly undermines such protections, should not be permitted to gain globally harmful force.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,
Petitioners,

v.

CSC HOLDINGS, INC. AND
CABLEVISION SYSTEMS CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR VARIOUS PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are professors who teach, research, and have an interest in the theory, law, and practice of copyrights, property rights, and contracts. Amici have no other stake in the outcome of this case,[1] but are interested in ensuring that copyright law develops in a way that best promotes creativity, innovation and competition in the digital world. A full list of amici is appended to the signature page. Both petitioner and respondent have consented to the submission of this brief by lodging blanket consents with the Court.

SUMMARY OF ARGUMENT

This case presents several of the most important copyright issues presented to this Court in recent years and has huge significance for the continued development of digital information systems. The decision of the Second Circuit Court of Appeals should be reviewed and reversed.

The decision below addresses copyright protection with respect to the unique ability of digital systems to enable delayed performance of copyrighted content to

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[1] Pursuant to S. Ct. R. 37.6, the amici represent that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici or their counsel made a monetary contribution to its preparation or submission except that The University of Houston Law Foundation program on Commercial Information Studies paid only the actual printing and filing costs. The parties' general letters of consent to the submission of amicus briefs have been filed with the clerk. Counsel of record for all parties received timely notification of amici's intention to file this brief.

fit times of the customer's own choosing. In the cable television industry, this is referred to as on-demand video. More broadly, it affects many online systems where the commercial service offered to customers is access to or viewing copyrighted content at a time and place of the customer's own choosing.

These systems have created significant and burgeoning new markets for copyrighted works. Determining the proper relationship between copyright law and other interests in these systems will shape these markets and, thus, the future of copyright law. The Court of Appeals' decision holds that the cable on-demand systems can be operated for-profit without obtaining permission from copyright owners. If this becomes law, copyright protection will be excluded from an important means of distribution in digital systems that may become the dominant method of distributing content in the future.

This case deals directly with cable television. But its ramifications extend far beyond this. In its decision, the Court of Appeals ruled on three issues of digital copyright law that affect all digital products, including all software and all Internet operations. These are: when does a copy exist within a computer, who is responsible for automated systems set out to make copies of works, and when is a performance "public" in a digital system that allows each user to view it at a time of their own choosing. It is impossible to overstate the importance of the answers to these issues in determining the future role of copyright in digital systems.

The Court of Appeals' decision should be reviewed because of its importance. The decision should be reversed because it conflicts with existing precedent and with the language and policy of the Copyright Act.

The Court of Appeals erred in creating a standard that absolves the operator of an automated service from responsibility for the copies that its automated system makes. Without statutory basis, it held that a "volitional" element is required, apparently meaning that a person does not make a copy unless that person (or a human employee) is physically involved in the act that yields a copy. In digital information systems, use of software to perform pre-programmed actions clearly involves conduct attributable to the person who deploys the software for the purpose.

The Court of Appeals erred in concluding that there was no public performance of the cable programs when customers subsequently requested and received performance of the copied program because the performance was not "public." The court invented a theory that a performance is not public unless the same copy or transmission can be viewed by multiple people. But the Court of Appeal's interpretation contradicts the plain meaning of the statute.

This Court should review the Court of Appeals' decision and reverse it.

ARGUMENT

I. THIS CASE PRESENTS SEVERAL OF THE MOST IMPORTANT COPYRIGHT ISSUES PRESENTED TO THIS COURT IN RECENT YEARS AND HAS HUGE SIGNIFICANCE FOR THE CONTINUED DEVELOPMENT OF DIGITAL INFORMATION SYSTEMS. REVIEW OF THIS CASE THUS PROVIDES THE COURT WITH A UNIQUE OPPORTUNITY TO GIVE GUIDANCE AND DIRECTION ON FUNDAMENTAL COPYRIGHT LAW ISSUES. IT WOULD ALSO ALLOW THIS COURT TO RESOLVE A SPLIT IN THE CIRCUITS CREATED BY THE LOWER COURT'S DECISION.

Digital information systems, including digital software, digital cable and the digital Internet, have created new ways of distributing copyrighted content, new information services, and new commercial opportunities. *See generally* Raymond T. Nimmer, *Information Law* ch. 1 (1997, 2008 Supp.). As these new distribution methods and new commercial opportunities have continued to arise and the technology has continued to evolve, we have moved far away from traditional methods of mass distribution of copyrighted content, such as sales of tangible copies or use of broadcast technologies as the only means of distribution.

Decisions on copyright law issues applicable to these new means of distribution provide a framework for the new markets they create. The decisions also determine whether copyright owners will have a stake in the new markets or whether copyright will become irrelevant with control transferred to persons and companies other than the creative workers who develop the content. There are fundamental social policy and social structure issues involved in such decisions. Indeed, the modern landscape of copyright law is characterized by a conflict between persons who would retain and support property rights that promote incentives to create,

and persons who would prefer diminishing those rights to enable broad commercial and other use of copyrighted works without compensation to copyright owners.

Copyright law is designed to provide incentives to creative workers to create and distribute their works. *See Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985); *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). If copyright owners do not have a stake in these new means of distribution and, as is likely, these new systems become more and more important in commerce as digital technology continues to evolve, those incentives to create and distribute are substantially weakened, if not destroyed.

This is a central issue in this case.

A. The Decision Deals With The Role Of Copyright In Systems That Enable Performances Of Copyrighted Works On Demand, Resolving This Allocates Control In Burgeoning Markets For Such Systems Between Copyright Owners And Other Parties, Including Cable Service Companies.

The case deals with copyright law applied to systems that provide content on demand (or, as described in the motion picture and related industries, video on demand). These systems use digital technology to make copyrighted works available to users at a time of the users' own choosing. When applied in a mass market environment, they create the ability to make mass distributions that are customized to individual users by operation of the software and communications systems they employ. *See generally* Stan Davis & Christopher

Meyer, *Blur: The Speed of Change in the Connected Economy* (1998).

If the copyright owner assents to use of its copyrighted work in such systems, they are an incredibly valuable contribution to the digital economy. Indeed, as witnessed by the many new systems evolving in reference to music, text, and digital photos, these on-demand systems may ultimately be the primary mass distribution system used for copyrighted works. *See, e.g., Apple's iTunes Hits 5 Billion Mark*, CNET-News.com, June 19, 2008, *available at* http://news.cnet.com/8301-10784_3-9972528-7.html; Joel Russell, *The Age of Media On-Demand Looks Like It's Close at Hand*, L.A. Bus. J. (May 29, 2006).

Recognizing the importance of this issue internationally, two World Intellectual Property Organization (WIPO) treaties specify that copyright owners control the right to make their content available in this manner. *See* WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996, art. 8 ("authors ... shall enjoy the exclusive right of authorizing any communication to the public of their works ... including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."); WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996, art. 10.

The United States has ratified both treaties, thus adopting their policy and obligating the United States to adopt the "making available" right in its own law. Pub. L. No. 105-304, 112 Stat. 2861 (1998). Indeed, the Register of Copyrights has stated that the making available position is and has been part of United States

law without the intervention of the Treaty. *WIPO Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary* 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights).

In this case, however, the Court of Appeals held that the copyright owner has no right to object to, or to seek royalties for, the commercial use of its work in this manner. This decision, if allowed to stand, cedes control of a major form of mass distribution of copyright works to persons other than the copyright owners.

The effect on copyright law and the creative work that it supports could be disastrous. The ability to benefit from markets for copyrighted works lies at the heart of the incentives created by copyright law. To the extent that those are taken away, copyright law's function in promoting the creation and distribution of creative works is diminished. Continued development of digital works at the rapid pace that we have seen in the past three decades is jeopardized.

B. The Decision Deals With Digital Copyright Law Issues That Affect All Internet And Digital Commerce, Including Deciding When A Digital Copy Exists And What Is The Effect Of Use Of Automated Software Systems To Make Copies; It Does So In A Manner Inconsistent With Rulings Of Other Circuits.

Since the mid-1970's to the early 1980's, copyright law has provided the primary property law basis for the creation and enforcement of rights in digital works. During that time, Congress recognized that computer programs were copyrightable works and decisions in

several Court of Appeals cases held that this applied to computer programs and other digital works within computer systems. *See generally Apple Computer, Inc.* v. *Formula Int'l Inc.*, 725 F.2d 521 (9th Cir. 1984); *Apple Computer, Inc.* v. *Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983); *Stern Elecs., Inc.* v. *Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Williams Elecs., Inc.* v. *Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

This premise has continued into the Internet and other emerging forms of digital processing and distribution. An established body of case law has evolved.

The Court of Appeals decision breaks with existing law and calls into question the scope and applicability of copyright law in several respects. For example:

- It creates a conflict with precedent that copies made within a computer memory are copies for purposes of copyright. *See MAI Sys. Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Stenograph L.L.C.* v. *Bossard Assocs., Inc.*, 144 F.3d 96 (D.C. Cir. 1998); *Storage Tech. Corp.* v. *Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).
- It conflicts with other law that establishes that a party using a software agent to automate a commercial result is responsible for the actions of that software. *See generally* 15 U.S.C. § 7001 (2000); Uniform Computer Information Transactions Act §§ 107, 112 (2002). Digital systems enable entities to automate functions previously performed by human beings. In these systems, electronic agents act on behalf of their client and implement high speed processing of digital files, making decisions based on program instructions. The adoption and use

of such systems binds the company doing so to their results. The Court of Appeals, however, created a voluntary human act requirement, immunizing automated systems from direct infringement claims.

These are important decisions affecting digital copyright law generally and will reverberate far beyond the arena of on-demand content. This Court should review the Court of Appeals' decision.

II. The Decision Of The Court Of Appeals Should Be Reviewed Because Of Its Importance. The Court's Rulings Should Be Reversed Because They Conflict With Existing Precedent And With The Language And Policy Of The Copyright Act.

The Court of Appeals' decision adopts a narrow view of copyright law applicable to digital information systems that conflicts with decisions of other courts and with the language of the statute, and that does so in a manner that substantially undermines copyright protection for digital content. Unless reversed, the decision may shape an important part of that market in a manner contrary to copyright law and policy and detrimental to the role of copyright in supporting the creation and distribution of creative works.

A. The Court Of Appeals Erred In Holding That A Defendant Is Not Responsible For Making The Copies That Its Automated Computer System Created.

Modern digital systems frequently use software to automate functions once performed by human actors. Indeed, software-based automation is a hallmark of the digital economy.

Cablevision deployed and sold subscriptions for an automated system that caused unauthorized copies and performances of copyrighted works, but the Court of Appeals held that Cablevision was not responsible for the copies that its system created. Instead, the court held that a "volitional" element is required, apparently holding that a person does not make a copy unless that person (or an employee) is physically involved in the act that creates a copy. This standard does not exist in the Copyright Act and, in the digital information age, creating such a requirement would create a huge gap in copyright protection.

The parties and the court below agree that copies were made when a requested program was transferred to more permanent storage for later access by the customer. Not surprisingly, the selection and copying was provided in part by software deployed by Cablevision to automate the process for the thousands of users that the system attracts. But the Court of Appeals held that Cablevision had no liability for these copies because the copies were made by the customer.

The court relied on a District Court decision in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), which it interpreted as establishing a "voluntary act" element in direct infringement requiring that a human being be involved in causing a copy to occur. But Netcom, a case involving a general purpose server that received and transmitted numerous, unscreened digital files, is readily distinguishable from this case where subscribers paid for the privilege of having Cablevision's system copy and provide content for their later viewing. In this instant case, no human employee pushed a button causing the copies to occur, but the company acted through its electronic agents, software

systems programmed to respond to customer requests. The business model in which a clerk sits behind a window and responds to customer requests does not exist in modern commerce where programs, automated answering services, and other types of automation provide the interaction with customers.

The Copyright Act does not specify that there must be a human actor involved for that person (or the employer) to be responsible for making a copy. In a digital information world in which sophisticated software is relied on to seek out and reproduce content, a requirement that a human act occur is inappropriate and would expose copyright owners to potentially widespread piracy by the mere artifact of using software surrogates.

The fact that a company or individual should be held responsible for the actions of software agents it has selected and deployed for the particular purpose is recognized in other areas of law. *See generally* 15 U.S.C. § 7001 (2000); Uniform Electronic Transactions Act § 14(1) (1999); Uniform Computer Information Transactions Act §§ 107, 112 (2002). It must be recognized in copyright law.

The proper analogy here is to an automated copy center, where an individual brings a book and asks the copy center to make a copy of it. If a human employee makes the copy, the employer is responsible. Just so, where the company deploys a computer program to respond to thousands of customer requests and cause copies to be made. The use of software to perform preprogrammed acts involves voluntary conduct by the software user—in establishing the software, setting it out for a particular purpose, and relying on it for a profit. If this does not suffice, copyright protection is hugely diminished and commercial entities can exploit

works copyrighted by others merely by using software to automate their otherwise infringing business plans.

B. The Lower Court Erred In Holding That There Was No "Public" Performance Of Cable Programs When Thousands Of Customers Viewed Delayed Performances Using Cablevision's System.

The Copyright Act gives the copyright owner the exclusive right to publicly perform or display the copyrighted work. 17 U.S.C. § 106. The cable television works here were performed to thousands of customers when the customers who had requested Cablevision to make copies subsequently viewed those copies. The Court of Appeals concluded that these performances were not "public" and therefore not covered by copyright law.

This cannot be correct. The court invented a theory that a performance is not public unless the same copy or same transmission can be viewed by multiple people. But the copyright act does not so provide. The Court of Appeals' interpretation contradicts the plain meaning of the statute. The statute provides:

> To perform or display a work "publicly" means ... to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display *receive it in the same place or in separate places and at the same time or at different times.*

17 U.S.C. § 101 (emphasis provided). The court argued that this was not met because each individual customer was the only person who could view the particular copy

that it created. But it is quite clear that Cablevision offered delayed performances to the public (its entire customer base) and transmitted the performance via its RS-DVR system. According to the Court of Appeals, each of these were private performances. But that wrongly ignores the system as a whole.

What is at stake is what is the role of copyright in commercial environments where digital technology enables offering works to the public under a selective distribution system, rather than by broadcast. The Copyright Act seemingly answers this—a public performance occurs even if the members of the public view it at different places and different time. That standard gives control of public performances to the person truly entitled to it—the copyright owner. The Court of Appeals' answer snatches this away and hands control to cable companies and others.

This Court should restore the balance set out in the statute: a public performance occurs when a digital or other system makes available to the public a performance of the work, even if that performance is experienced by each of those who choose to watch or experience it at different times.

CONCLUSION

The petition for writ of certiorari should be granted and the Court of Appeals' decision should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX—LIST OF AMICI

Bruce E. Boyden is an Assistant Professor of Law at Marquette University Law School, where he teaches intellectual property and internet law. He has extensive experience in information technology issues, including copyright, digital rights management, privacy law, e-commerce, domain names, and computer trespass. Prior to becoming a professor, he was an attorney with Proskauer Rose LLP for eight years.

Jay Dougherty is a professor at Loyola Law School in Los Angeles, where he teaches courses in copyright law. He was an adjunct professor for ten years at the University of Southern California Law Center and has extensive copyright experience from years of working at leading entertainment law firms and in high-level positions for motion picture studios and production companies. Prof. Dougherty is past President of the Los Angeles Copyright Society and co-editor in chief of the Journal of the Copyright Society of the U.S.A.

Shubha Ghosh is a Professor of Law at The University of Wisconsin Law School and Associate Director at INSITE. His scholarship and teaching are in the areas of intellectual property theory and policy, competition policy, legal theory, and institutional analysis of markets and legal institutions. Professor Ghosh has published over fifty scholarly articles, book chapters, books, and commentaries, and he is the co-author of two legal casebooks: *Intellectual Property in Business Organizations* and *Intellectual Property: Private Rights, Public Interest, and The Regulation of Creative Activity*.

Stan Liebowitz is the Ashbel Smith professor of economics and Director of the Center for the Analysis of Property Rights and Innovation at the School of Management at the University of Texas at Dallas. He has written five books and numerous articles, among them the first article (in 1985) suggesting conditions under which unauthorized copying might be beneficial to copyright owners. He gave the inaugural keynote address to the Society for Economic Research on Copyright Issues in 2002, and served as its president in 2006-2008. His research has been the focus of stories in numerous outlets including The Economist, The Wall Street Journal, The New York Times, The Financial Times, and a program on the BBC.

Robert Merges is the Wilson Sonsini Goodrich & Rosati Professor of Law and Technology at the University of California at Berkeley (Boalt Hall) and Director of the Berkeley Center for Law & Technology. Merges has authored or co-authored three books, *Patent Law and Policy: Cases and Materials*, *Intellectual Property in the New Technological Age*, and *Legal Protection for Computer Technology*. In addition to teaching and research projects, Merges also serves as a special consultant to the U.S. Department of Justice, Antitrust Division, and is a member of the Department's Task Force on Intellectual Property.

Raymond Nimmer is Dean, the Leonard Childs Professor of Law and the director of the Intellectual Property and Information Law Institute at University of Houston Law Center. Professor Nimmer is the author of over twenty books and numerous articles. His books include the treatises *The Law of Computer Technology*, *Information Law*, and *The Law of Commercial Electronic Transactions* and he is a member of

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Lionel S. Sobel is a professor of law at Southwestern Law School and the Chair of the ABA Forum Committee on the Entertainment and Sports Industries. The publisher and editor for over 25 years of the Entertainment Law Reporter, Professor Sobel is also the author of texts on the law and business of the entertainment and sports industries. He has testified on issues ranging from antitrust laws in major league baseball to international licensing practices in the motion picture, music and computer software industries before the U.S. House of Representatives, California Senate, California Assembly, and U.S. Tax Court.

Rodney Smolla is Dean and Roy L. Steinheimer, Jr. Professor of Law at Washington and Lee University School of Law. He is the author of several books, including *Free Speech in an Open Society*, which won the 1992 William O. Douglas Prize. He regularly speaks and writes on issues involving the First Amendment and intellectual property law.